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# SAVING PRIVACY FROM HISTORY

Samantha Barbas\*

## INTRODUCTION

We are in the midst of a privacy panic.<sup>1</sup> Panicking about privacy is nothing new; we have been worried about privacy and its loss for over a hundred years now, since at least 1890, when Warren and Brandeis wrote *The Right to Privacy*, the foundational text of the tort law of privacy.<sup>2</sup> Warren and Brandeis envisioned the “right to privacy” as a means to address what were perceived as serious threats to privacy and identity posed by the new media of the day—yellow journalism, gossip columns, and kodak photography. Our privacy concerns are arguably more intense now, and with good reason—new technologies can track our thoughts, movements, and intimacies and expose them to a global audience in an instant. We have very little privacy, and we have not gotten over it.<sup>3</sup>

It is widely recognized that the tort action proposed by Warren and Brandeis, written into law in most states over the twentieth century, failed to provide the kind of protection against the media that the authors had envisioned.<sup>4</sup> As many have convincingly argued, tort privacy is especially inadequate to address the needs of the twenty-first century, when new technologies magnify privacy injuries.<sup>5</sup> There have

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1. See, e.g., Harry Lewis, *How Facebook Spells the End of Privacy*, BOS. GLOBE, June 14, 2008, at A11; Jeffrey Rosen, *The End of Forgetting*, N.Y. TIMES MAG., July 25, 2010, at 32; Daniel J. Solove, *The End of Privacy?*, SCI. AM., Sept. 2008, at 101; Richard Stengel, *The End of Privacy? Not Yet*, TIME, Mar. 21, 2011, at 4.

2. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

3. The oft-cited phrase, “You have zero privacy anyway, get over it,” has been attributed to Scott McNealy, former CEO of Sun Microsystems. *Private Lives? Not Ours!*, PCWORLD (Apr. 18, 2000, 12:00 AM), [http://www.peworld.com/article/16331/private\\_lives\\_not\\_ours.html](http://www.peworld.com/article/16331/private_lives_not_ours.html).

4. See generally Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983). See also Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 426 (1996) (pronouncing the privacy tort “dead”); Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1889 (2010) (“Today, the chorus of opinion is that the tort law of privacy has been ineffective, particularly in remedying the burgeoning collection, use, and dissemination of personal information in the Information Age.”).

5. See generally Patricia Sanchez Abril, *Perspective, A (My)Space of One's Own: On Privacy and Online Social Networks*, 6 NW. J. TECH. & INTELL. PROP. 73 (2007); Danielle Keats Citron,

been numerous suggestions for legal reform; existing laws have been deconstructed, analyzed, and criticized.<sup>6</sup> Yet the law of privacy has not been sufficiently historicized, to our detriment.<sup>7</sup> The premise of this Article is that an important key to the reform of the tort law of privacy lies in understanding its historical evolution.

This Article focuses on the history of the privacy tort, which permits damages for dignitary injuries caused by unwanted and embarrassing publicity of private facts and images.<sup>8</sup> Currently, publicly disclosing “a matter concerning the private life of another” constitutes a tort in most states if it “would be highly offensive to a reasonable person, and

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*Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805 (2010); Neil M. Richards, *The Limits of Tort Privacy*, 9 J. TELECOMM. & HIGH TECH. L. 357 (2011). See also Erwin Chemerinsky, Lecture, *Tucker Lecture, Law and Media Symposium*, 66 WASH. & LEE L. REV. 1449, 1449–50 (2009) (“Even now, the cases about public disclosure of private facts do not seem to pay much attention to whether it is occurring in newspapers, radio, television, or the Internet. Here, too, the tort has developed and been refined unaffected by how the media has grown and changed.”).

6. See, e.g., JON L. MILLS, *PRIVACY: THE LOST RIGHT* (2008); HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2010); Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image over the Internet*, 49 SANTA CLARA L. REV. 313 (2009); Erwin Chemerinsky, *Rediscovering Brandeis's Right to Privacy*, 45 BRANDEIS L.J. 643 (2007); Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039 (2009); Lauren Gelman, *Privacy, Free Speech, and “Blurry-Edged” Social Networks*, 50 B.C. L. REV. 1315 (2009); Jacqueline D. Lipton, *Mapping Online Privacy*, 104 NW. U. L. REV. 477 (2010); Andrew Jay McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989 (1995); Connie Davis Powell, “You Already Have Zero Privacy. Get over It!” *Would Warren and Brandeis Argue for Privacy for Social Networking?*, 31 PACE L. REV. 146 (2011); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967 (2003); Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005); Jaime A. Madell, Note, *The Poster's Plight: Bringing the Public Disclosure Tort Online*, 66 N.Y.U. ANN. SURV. AM. L. 895 (2011).

7. The history of the Warren and Brandeis tort has been misrepresented, misunderstood, and underutilized in much of the legal scholarship. The standard account begins with the 1890 Warren and Brandeis article, goes to the famous 1960 law review article, *Privacy*, by William Prosser, then to the present day. This narrative overemphasizes the writings of legal theorists and fails to appreciate the interesting and important work taking place in the courts, and in twentieth-century American culture more broadly, in defining the contours of the right to privacy and the boundaries of acceptable publicity. For works that incorporate a historical approach, see Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890–1990*, 80 CALIF. L. REV. 1133 (1992); Benjamin E. Bratman, *Brandeis and Warren's The Right to Privacy and the Birth of the Right to Privacy*, 69 TENN. L. REV. 623 (2002); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989); Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA L. REV. 289 (2002); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004); Zimmerman, *supra* note 4.

8. In 1960, William Prosser divided the privacy tort into four branches: (1) intrusion upon the seclusion of another, (2) unreasonable publicity given to another's private life, (3) appropriation of another's name and likeness, and (4) publicity that unreasonably places another in a false light before the public. See William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). The cases discussed in this Article primarily fall under the second and fourth branches.

is not of legitimate concern to the public.”<sup>9</sup> Mass media publicity is not a required element of the tort, although the right to privacy was conceived as a legal response to the perceived abuses of the popular press. A significant number of tort privacy cases have involved media defendants, and these cases are the focus of this Article.<sup>10</sup>

Under the privacy tort, liability can be imposed for the publicity of material that is “private.” According to the prevailing doctrine, most anything that takes place outside the home is not private, nor is information disclosed to even a few other persons. Thus, an intimate scene outdoors, such as a burial, or a secret shared with a group of friends can be “public” under the law.<sup>11</sup> On the issue of what is a privileged matter of public concern, or “newsworthy,” courts have often deferred to the media. Gruesome photos, stories of accidents and crimes, and the embarrassing details of an individual’s personal life have been held to be newsworthy matters of public concern apparently by virtue of the fact that they appeared in the press.<sup>12</sup>

These rules fail to capture the complex and nuanced ways that we understand and experience privacy in real life. They are also outdated. They were, for the most part, created several decades ago, in the period roughly between the 1920s and the 1950s. The rules were built around a set of assumptions about the nature of personal identity in mass society, the capabilities and limitations of existing technologies, and the social functions of the mass media. Social norms of privacy, and media institutions and technologies, have transformed dramatically since then, yet the law clings to its mid-twentieth-century foundations.

In what follows, I present the social and cultural roots of modern tort privacy doctrine and a summary of the evolution of the law from its nineteenth-century origins to the present. Though the Article discusses changes internal to the law, it explains the law’s development primarily as a function of shifting social, cultural, and technological contexts. It explains why the privacy tort fell short of its creators’ expectations and why a nation that has been so solicitous of privacy in

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9. See RESTATEMENT (SECOND) OF TORTS § 652D (1977).

10. This Article also addresses related state privacy statutes applied to media publications, most notably that of New York. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009).

11. See Strahilevitz, *supra* note 6, at 943.

12. See, e.g., *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940); *Goelet v. Confidential, Inc.*, 171 N.Y.S.2d 223, 226, 227 (App. Div. 1958); *Abernathy v. Thornton*, 83 So. 2d 235, 237 (Ala. 1955); *Jenkins v. Dell Publ’g Co.*, 251 F.2d 447, 451 (3d Cir. 1958); *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 488, 489 (Cal. 1998); Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 195–96 (1979).

many respects has fostered a press that is freer to invade privacy than perhaps any other in the world.

In 1890, Warren and Brandeis argued that there were strict divisions between public and private life and that every person, from the famous to the unknown, had a broad and inviolable "zone" of personal privacy. The unauthorized publication of a person's portrait, or facts about her personal affairs, not only produced dignitary injuries, but also had a damaging effect on public morals. These principles became the bases of early court decisions and legal commentaries that recognized and endorsed a tort remedy for invasions of privacy by the press. By the 1940s, however, this view of privacy and its legal protection had been transformed, and the groundwork established for a new legal model of privacy.

Under this new model, gossip columns, "human interest" stories, and other displays of private life in the media were no longer categorically a social evil, but potentially served important public functions. Both social need and constitutional mandates required their relatively free and unfettered circulation. Courts reasoned that by virtue of living in a "culture of exposure" with an inquisitive public, aggressive and intrusive journalists, and technologies for disseminating words and images on a mass scale, every person assumed the risk of mass media publicity by doing nothing more than participating in the activities of daily life. Courts also concluded that the conditions of modern life, where people had their privacy assaulted daily by the telephone, questionnaires, census takers, and "the candid camera" had desensitized the public to invasions of privacy, making them unlikely to suffer serious dignitary harms from media exposure.<sup>13</sup> Only depictions that were overtly uncomplimentary would potentially warrant damages for invasion of privacy. These assumptions, written into law, often precluded recovery for invasions of privacy in cases involving media defendants.<sup>14</sup>

Despite the weakness of privacy law, extra-legal forces—editorial practices and professional ethics codes, the inherent limitations of existing media technologies, and social norms of privacy—provided safeguards against deeply intrusive and humiliating media exposures. In the post-World War II era, however, many of those safeguards diminished without increases in legal protection. Today journalists are more likely to seek out and publish intimate personal information than in

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13. Meyer Berger, *Surrender of Privacy*, SCRIBNER'S MAG., Apr. 1939, at 16, 16.

14. In 1983, Diane Zimmerman wrote that she found "fewer than 18 cases in which a plaintiff" either won or stated a cause of action for public disclosure. Zimmerman, *supra* note 4, at 293 n.5.

the past, the public is less likely to restrain them, and new media and technologies pose unprecedented threats to privacy with the potential for significant dignitary and reputational injuries. This new technological and social environment urges a reconsideration of the role of law in the protection of privacy, and privacy law's foundational premises and norms.

This Article does not undertake a theoretical discussion of the importance of privacy, which has been done extensively elsewhere.<sup>15</sup> Rather, it assumes that a certain amount of privacy is necessary for a healthy, liberal, democratic society and that unwanted publicity of personal life can be harmful under many circumstances.<sup>16</sup> Nor does it resolve the familiar free speech question.<sup>17</sup> It acknowledges that privacy and free speech may be in tension, but insists that they are not antithetical.<sup>18</sup> It proceeds from the belief that privacy is a value that the law should prioritize and protect, and that it may do so without impinging on our legitimate informational needs.

Part II begins with the origins of the Warren and Brandeis tort in 1890. It details the emergence of what I describe as the turn-of-the-century model of legal privacy in cases and legal commentary around 1900.<sup>19</sup> Part III focuses on the second, foundational phase of modern privacy law during the period between the two world wars, when the earlier model of privacy was transformed. A burgeoning celebrity culture, new photographic and media technologies, developing styles and genres of journalism, and the liberalization of free speech law created the conditions under which courts determined that the right to privacy must, on balance, yield to the public's "right to know" about the personal affairs of others. Part IV then examines the entrenchment of

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15. See, e.g., STEVEN J. HEYMAN, *FREE SPEECH AND HUMAN DIGNITY* (2008); NISSENBAUM, *supra* note 6, at 67–88; Charles Fried, *Privacy*, 77 YALE L.J. 475 (1968); Ruth Gavison, *Lecture, Too Early for a Requiem: Warren and Brandeis Were Right on Privacy vs. Free Speech*, 43 S.C. L. REV. 437 (1992); Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26 (1976).

16. See THOMAS NAGEL, *The Shredding of Public Privacy, in CONCEALMENT AND EXPOSURE* 27, 29 (2002); JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 11 (2000); ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980).

17. See, e.g., Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195 (1990); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000).

18. See generally Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974); Gavison, *supra* note 15; Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139; Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683 (1996); Solove, *supra* note 6.

19. See *infra* notes 22–134 and accompanying text.

the doctrine in the postwar era and demonstrates how privacy law remained static while the world around it changed.<sup>20</sup> Part V concludes by suggesting how an understanding of privacy law's past might be used to save privacy from history.<sup>21</sup>

## II. THE ORIGINS OF THE RIGHT TO PRIVACY, 1890–1920

Privacy has been described as a human need that is essential and universal.<sup>22</sup> It has been said that privacy is necessary for psychological equilibrium, intimate relationships, and the ability to freely shape one's identity; without it, souls destabilize, communities dissolve, and relationships crumble.<sup>23</sup> The efforts that cultures around the world have historically taken to protect privacy testifies to its transcendent and timeless nature.<sup>24</sup> At the same time, privacy is a concept that is deeply contextual; it embodies beliefs and aspirations that are specific to time, place, and culture.<sup>25</sup> It is from this starting point—privacy as a concept that is historically contingent, socially constructed, and attuned to felt need and lived experience—that we will move forward.

The history of the modern United States is in part the story of revolutions in privacy, of shifting boundaries between public and private life. These changes have often yielded great public anxiety and privacy panics.<sup>26</sup> The late 1800s saw one of the first major privacy panics. In contrast to later periods, in which the primary threats to privacy were described as the surveillance and data collection efforts of the state, the concerns of this time focused on the mass-circulation press.<sup>27</sup>

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20. See *infra* notes 135–488 and accompanying text.

21. See *infra* notes 487–519 and accompanying text.

22. See RICHARD F. HIXSON, *PRIVACY IN A PUBLIC SOCIETY* 3–25 (1987); see also Bezanson, *supra* note 7, at 1134 (“The continuing impact of the Warren and Brandeis article is testament to the timeless quality of the idea of privacy . . .”).

23. See WESTIN, *supra* note 16, at 39–42 (describing privacy as central to “intra-psychic balance”); Gavison, *supra* note 16, at 442.

24. See Robert S. Gerstein, *Intimacy and Privacy*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 265 (Ferdinand David Schoeman ed., 1984) (describing the need for privacy to achieve human intimacy); WESTIN, *supra* note 16, at 11–22 (describing the “universal” nature of privacy).

25. See ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 72 (1995) (“[T]he public disclosure tort . . . draws upon the social norms governing the flow of information in modern society.”); Bezanson, *supra* note 7, at 1134 (“*The Right to Privacy* was a product of its time. . . . Warren and Brandeis presented the idea of privacy as it should be understood: as deeply entrenched in culture, evolving over time, fundamental to the wholeness of the individual, and reflecting the social environment in which people exist.”).

26. See generally FREDERICK S. LANE, *AMERICAN PRIVACY: THE 400-YEAR HISTORY OF OUR MOST CONTESTED RIGHT* (2009); Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335.

27. One eminent legal scholar suggests that the reason for the focus on the media's invasions of privacy, rather than those committed by the state, is that “the technology of intrusion”—

As one newspaperman noted, writing about reportorial invasions, "The newspaper dares rush in where government fears to tread."<sup>28</sup> The right to privacy originated as a response to the perceived assault to privacy posed by the popular press; it was "the right to pass through this world, if [one] wills, without having his picture published, his business enterprises discussed . . . , or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers."<sup>29</sup>

### A. *Newspapers and the Privacy Panic*

The late nineteenth century saw a transformation in American journalism, one marked by the rapid growth of the mass-circulation press and new styles and conventions for pursuing and reporting the news.<sup>30</sup> Most famously, this era saw the birth of yellow journalism, the notorious brand of sensationalistic news reporting pioneered by publishers Joseph Pulitzer and William Randolph Hearst,<sup>31</sup> and the popularization of human interest journalism, described by one publisher as "chatty little reports of tragic or comic incidents in the lives of the people."<sup>32</sup> In its aim to present the news so that it read like entertainment, human interest journalism publicized material from the dark recesses of life: crime reports, gossip, and lurid romance.<sup>33</sup> Most newspapers by the late nineteenth century ran gossip columns, and some of the larger papers had separate columns dealing with politicians, businessmen, society figures, writers, and athletes.<sup>34</sup> As one critic lamented, they allowed "hungry eyes [to] . . . peer into private

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namely, wiretapping and electronic surveillance—"had [not] developed to the point where [they were seen as] present[ing] the same threat to individuality as did lurid journalism." See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 983 (1964). By 1890, however, the telephone, telegraph, inexpensive portable cameras, and sound recording devices had come into use. The "new journalism" of the time represented another force that "increased the vulnerability of individuals to having their actions, words, images, and personalities communicated without their consent beyond the protected circle of family and chosen friends." Dorothy J. Glancy, *The Invention of the Right to Privacy*, 21 ARIZ. L. REV. 1, 8 (1979).

28. SILAS BENT, *BALLYHOO: THE VOICE OF THE PRESS* 54 (1927).

29. Elbridge L. Adams, *The Law of Privacy*, 175 N. AM. REV. 361, 361 (1902).

30. See generally MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* 88–120 (1978).

31. DAVID R. SPENCER, *THE YELLOW JOURNALISM: THE PRESS AND AMERICA'S EMERGENCE AS A WORLD POWER* 16 (2007).

32. HELEN MACGILL HUGHES, *NEWS AND THE HUMAN INTEREST STORY* 12–13 (1968).

33. See SCHUDSON, *supra* note 30, at 89; see also GERALD J. BALDASTY, *THE COMMERCIALIZATION OF NEWS IN THE NINETEENTH CENTURY* 139 (1992) ("In 1900, American newspapers contained more than news of politics and business; they were a colorful amalgam of general news, sports, entertainment, comics, and even fiction.").

34. See CHARLES L. PONCE DE LEON, *SELF-EXPOSURE: HUMAN INTEREST JOURNALISM AND THE EMERGENCE OF CELEBRITY IN AMERICA, 1890–1940*, at 3 (2002).



houses, study banquets, balls, teas . . . very much as spectators in the parquet and boxes dwell upon scenes and tableaux behind the theater foot-lights.”<sup>35</sup> Though decried at the time as scandalously invasive, the gossip was relatively benign by today’s standards. When President Grover Cleveland married while in office, reporters detailed only where he stayed during his honeymoon, what he wore, and what he ate. The coverage was widely criticized as a massive invasion of the President’s privacy.<sup>36</sup>

The popular press of the late nineteenth century made newspaper reading a mass pastime.<sup>37</sup> Between 1870 and 1900, as cities experienced extensive population growth from industrialization and immigration, the circulation of daily newspapers increased 1,100%.<sup>38</sup> Publishers courted urban workers by fashioning the newspaper as a form of inexpensive entertainment.<sup>39</sup> With their command over the attention, if not the values, of their working- and middle-class readership, the popular press challenged the cultural authority of the social elite and fed into what one writer has described as the “virtual paranoia of the masses” among the upper class of that time.<sup>40</sup> The press also threatened the reputations of the wealthy and powerful by exposing their pretenses and hypocrisies to public view.<sup>41</sup> In the words of sociologist Edward Shils, the popular press allowed the public “to be in proximity to the mighty, the famous, the glorious, the authoritative, and to derogate them at the same time.”<sup>42</sup>

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35. George T. Rider, *The Pretensions of Journalism*, 135 N. AM. REV. 471, 479 (1882).

36. JANNA MALAMUD SMITH, *PRIVATE MATTERS: IN DEFENSE OF THE PERSONAL LIFE* 188–89 (1997).

37. See *supra* note 30 and accompanying text.

38. DON R. PEMBER, *PRIVACY AND THE PRESS* 10–11 (1972).

39. William Randolph Hearst claimed that he published only those stories that “contain[ed] that thrill of sensation loved by the man on the street and the woman in the kitchen.” LEONARD RAY TEEL, *THE PUBLIC PRESS, 1900–1945: THE HISTORY OF AMERICAN JOURNALISM* 7 (2006).

40. Glancy, *supra* note 27, at 35.

41. See LAWRENCE M. FRIEDMAN, *GUARDING LIFE’S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPERTY, AND PRIVACY* 220–23 (2007).

42. Edward Shils, *Privacy: Its Constitution and Vicissitudes*, 31 LAW & CONTEMP. PROBS. 281, 293 (1966).

Affirmation and sacrilege were rendered simultaneously practicable by the activities of the new profession of popular journalism. The result was a new sector of the profession of journalism that regarded the penetration of the private sphere as its main occupational task. It justified this penetration by reference to the satisfaction of popular desires and the freedom of the press unrestrainedly to enlighten the public.

*Id.* at 293–94.

With its sensationalism and dramatic excess, the popular press was also seen as a threat to upper-class norms of modesty and reticence.<sup>43</sup> In this time, emotional self-control was lauded as a paramount virtue,<sup>44</sup> and the genteel person was to convey a restrained appearance in public. It was only in private—in the home—that he could drop his public “front” and reveal his feelings, desires, and true self.<sup>45</sup> The private sphere was the domestic realm of emotion, the body, and intimate relationships; the public sphere was the domain of social and commercial relations.<sup>46</sup> In public, one kept his private affairs to himself and was “pained and distressed by anything resembling publicity.”<sup>47</sup> Only the uncouth displayed their feelings and private affairs in public and showed “the secrets of their homes, their social entertainments and aspirations to the world.”<sup>48</sup>

Unwanted publicity of private life was thus seen as destructive of the social order because it disturbed the formalized rituals of self-presentation and ruptured the strict boundaries between public and private life. As the critic E.L. Godkin had written in *Scribner's Magazine* in 1890, gossip columns and human interest stories, by displaying the intimacies of private life before a mass audience, interfered with a person's prerogative to “decid[e] how much or how little the community shall see of him, or know of him, . . . to decide how much knowledge . . . of his tastes, and habits, of his own private doings and affairs” others would be able to access.<sup>49</sup> The development of hand-held “kodak” cameras in the 1880s and new halftone printing techniques that enabled the publication of photographs in newspapers intensified these fears.<sup>50</sup> One New York newspaper employed a photographer to

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43. See ROCHELLE GURSTEIN, *THE REPEAL OF RETICENCE: AMERICA'S CULTURAL AND LEGAL STRUGGLES OVER FREE SPEECH, OBSCENITY, SEXUAL LIBERATION, AND MODERN ART* 32–33 (1996).

44. See WARREN I. SUSMAN, *CULTURE AS HISTORY: THE TRANSFORMATION OF AMERICAN SOCIETY IN THE TWENTIETH CENTURY* 273–77 (1984).

45. See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 1–2 (1959); KAREN HALTTUNEN, *CONFIDENCE MEN AND PAINTED WOMEN: A STUDY OF MIDDLE CLASS CULTURE IN AMERICA, 1830–1870*, at 104 (1982); JOHN F. KASSON, *RUDENESS & CIVILITY: MANNERS IN NINETEENTH-CENTURY URBAN AMERICA* 116 (1990).

46. For a discussion of gender and the public-private distinction, see Barbara Welter, *The Cult of True Womanhood: 1820–1860*, 18 AM. Q. 151 (1966).

47. *The Right of Privacy*, N.Y. TIMES, July 3, 1902, at 8.

48. *Old Principles Upheld*, N.Y. TIMES, Jun. 8, 1897, at 7.

49. E.L. Godkin, *The Rights of the Citizen to His Own Reputation*, SCRIBNER'S MAG., July–Dec., 1890, at 58, 65.

50. See Robert E. Mensel, “Kodakers Lying in Wait”: *Amateur Photography and the Right of Privacy in New York, 1885–1915*, 43 AM. Q. 24, 25 (1991). In 1888, George Eastman marketed his new Kodak camera, which was advertised as simple, light, and designed for taking surreptitious photographs of unwilling people. LANE, *supra* note 26, at 55. On halftone printing, see *id.* at 54–55.

stand in the street and take snapshots of every person who appeared to be important.<sup>51</sup> From the cameraman's perspective, the value of such photos was not so much "that the photographs [were] of notabilities," but that they were candid and often "taken by stealth when the subjects were unconscious of the purpose of the person manipulating the camera."<sup>52</sup> It was thought that photographs, particularly pictures of the face, captured a person's soul and revealed the innermost identity of a person, especially when they were unposed.<sup>53</sup> The taking and publishing of people's photographs without consent, even in public places, was thus considered to be an assault to privacy because of the photograph's inherently personal nature.

Ordinary back-fence gossip was not described as an invasion of privacy.<sup>54</sup> When gossip circulated face to face, it was not permanently injurious to one's dignity or reputation. It might eventually be forgotten, the victim could perhaps rehabilitate herself, or the local community, in its collective wisdom, might discredit the rumor. In the setting of the small community, unflattering publicity was mediated by personal observations and social norms. This was not necessarily the case when one's image or private affairs appeared in the press, unmoored from context, displayed to a vast audience of strangers in permanent print form. As one author noted in 1905:

So long as he is talked about by his neighbors, he is usually spared the mortification of knowing it; but when his foibles, his family secrets, the amount of his income, what he eats and drinks . . . are printed in the newspapers and published broadcast through the community, . . . he feels a natural resentment.<sup>55</sup>

Such publication inflicted on the subject "mental pain and distress, far greater than could be inflicted by mere bodily injury."<sup>56</sup> In a small town, the victim could exact justice by "horsewhipping" the editor, but that remedy was generally not available against the big-city publisher.<sup>57</sup> Because the offenses of the yellow journals were "incompati-

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51. *The Rights of Privacy*, N.Y. TIMES, July 19, 1896, at 11.

52. *Id.*

53. See ALAN TRACHTENBERG, *READING AMERICAN PHOTOGRAPHS* 27 (1989); Mensel, *supra* note 50, at 31.

54. The right of privacy was aimed at the abuses of the press. According to Warren and Brandeis, the law would not grant redress for any harms suffered from oral communication. See Warren & Brandeis, *supra* note 2, at 217.

55. Elbridge L. Adams, *The Right of Privacy, and Its Relation to the Law of Libel*, 39 AM. L. REV. 37, 52 (1905).

56. Warren & Brandeis, *supra* note 2, at 196.

57. See Adams, *supra* note 55, at 52. There were in fact stories about public figures who "horsewhipped" aggressive newspaper cameramen. When the socialite Reginald Vanderbilt did this, the *New York Times* commented that he had no choice because there were no "legal measures" to prevent or avenge this outrage upon his privacy and his modesty." *"The Right to Pri-*

ble” with the norms of civilized society, the *New York Times* argued in 1902, “decent people will say that it is high time that there were . . . a law.”<sup>58</sup>

### B. The Law of Privacy

Beginning in the 1890s, several states attempted to ban newspaper and magazine “invasions of privacy” by statute. The legislature of New York made “it a misdemeanor to publish any private letter, telegram or papers found on [a] person” who had committed suicide or been found dead.<sup>59</sup> In 1899, the California legislature passed a privacy statute that made it a misdemeanor to publish the portrait of any person in a newspaper without the individual’s consent; Pennsylvania passed a similar law four years later;<sup>60</sup> and Chicago passed an anti-paparazzi law shortly thereafter.<sup>61</sup>

In 1890, Samuel Warren and Louis Brandeis published their famous *Harvard Law Review* article, *The Right to Privacy*,<sup>62</sup> which is credited with inventing the tort law of privacy and is generally considered the starting point of the legal history of privacy in the United States.<sup>63</sup> Warren was a wealthy and prominent Boston lawyer, and Brandeis was his former law partner. Warren was incensed at finding details of his family’s home life and social affairs spread on the society pages of several newspapers.<sup>64</sup> More broadly, the authors were outraged by the new trend of invasive news reporting and what they considered to be the unwarranted and tasteless depiction of private life in the

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vacy,” N.Y. TIMES, Apr. 12, 1903, at 6; see also HENRY JAMES, *THE REVERBERATOR* (1949) (involving a man’s contemplated duel with a journalist who printed the details of his personal life in a gossip sheet).

58. *The Right to Privacy*, N.Y. TIMES, Aug. 23, 1902, at 8.

59. Adams, *supra* note 29, at 367. In 1897, the New York legislature also passed a bill—ultimately defeated by pressure from publishers—that made it a misdemeanor “to print or publish in any newspaper, periodical, pamphlet, or book any portrait or alleged portrait of any person or individual . . . without having first obtained his or her written consent.” *The Protection of Privacy*, N.Y. TIMES, Mar. 14, 1897, at 16 (internal quotation marks omitted).

60. PEMBER, *supra* note 38, at 64; Gormley, *supra* note 26, at 1354. The California provision was repealed in 1915. Gormley, *supra* note 26, at 1354 n.90. The Pennsylvania law was repealed in 1907. *Id.* at 1354 n.92.

61. See *The Right to Privacy*, CHI. DAILY TRIB., Dec. 6, 1905, at 10.

62. Warren & Brandeis, *supra* note 2.

63. However, as Ruth Gavison notes, even before the 1890 article, privacy was protected under other legal doctrines, such as contract, trespass, defamation, and breach of confidence. See Gavison, *supra* note 16, at 464; see also HIXSON, *supra* note 22, at 36; Bratman, *supra* note 7, at 632–33; Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1894–95 (1981).

64. PEMBER, *supra* note 38, at 21–23; see also Amy Gajda, *What if Samuel D. Warren Hadn’t Married a Senator’s Daughter?: Uncovering the Press Coverage that Led to “The Right to Privacy,”* 2008 MICH. ST. L. REV. 35, 55–58.

press.<sup>65</sup> In the late nineteenth century, critics used the term "newspaperization" to describe the perceived "tyranny" of the press "over public men [and] . . . private life."<sup>66</sup> Warren and Brandeis wrote:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.<sup>67</sup>

Arguing that it was the function and duty of the common law to protect against injuries to the person caused by new social circumstances, Warren and Brandeis called for a legal "right to privacy." They proposed a cause of action that would allow victims of unwanted publicity to sue in tort and recover damages for the emotional and dignitary harm that came from having one's image or private affairs displayed in the press.<sup>68</sup> At the time, there were no legal remedies available for such unwanted, truthful publications. The law of libel dealt only with falsehoods, and it remedied only injuries to reputation, not to the feelings.

Warren and Brandeis argued that the common law already protected a person's right to decide if, when, and to what extent his "thoughts, emotions, and sensations" would be expressed to others.<sup>69</sup> They cited English intellectual property cases in which courts granted injunctions to stop the unauthorized publication of letters and various forms of art.<sup>70</sup> Warren and Brandeis argued that these decisions should be seen as protecting the "right of the individual to be let alone."<sup>71</sup> Pointing to a general trend in the law toward protection of human emotions, not merely property and the body, they described the right to privacy not as a proprietary right, but a spiritual interest rooted in "personality."<sup>72</sup>

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65. See Glancy, *supra* note 27, at 25-27.

66. *Id.* at 11-12 (quoting JAMES FENIMORE COOPER, *THE AMERICAN DEMOCRAT* 183 (Penguin Books 1969) (first published 1838)); see also Condé Benoist Pallen, *Newspaperism*, LIPPINCOTT'S MONTHLY MAG., Nov. 1886, at 470, 475 ("This tyranny is fast growing intolerable, its chains heavier, and its exactions more cruel. . . . Through the newspaper no man's private life is sacred, and least of all that of a public man.").

67. Warren & Brandeis, *supra* note 2, at 196, 214.

68. See *id.* at 205.

69. *Id.* at 195.

70. *Id.* at 198-99.

71. *Id.* at 205.

72. *Id.*

*The Right to Privacy* was widely read, and it generated much praise and sympathetic commentary.<sup>73</sup> Following the article's publication, several cases were brought in state courts claiming a cause of action for invasion of privacy. In some states, a common law right to privacy was recognized.<sup>74</sup> In others, including New York, a right to privacy was created by statute.<sup>75</sup> In 1905, the Georgia Supreme Court became the first court of last resort to recognize the privacy tort with its decision in *Pavesich v. New England Life Insurance Co.* The photo of an artist, Pavesich, appeared in an insurance company's advertisement published in the *Atlanta Constitution*.<sup>76</sup> Pavesich posed for the photo but did not authorize its use in the ad.<sup>77</sup> The court held that he had a cause of action for invasion of privacy.<sup>78</sup> His picture thrust before the public gaze, Pavesich lost the ability to control his public image—"to exhibit himself to the public at all proper times, in all proper places, and in a proper manner" and "to withdraw from the public gaze at such times as [he] may see fit."<sup>79</sup> As a private citizen, not a public figure, Pavesich had not "waived" his right to privacy.<sup>80</sup>

In contrast to modern privacy law, in which the operative distinction between actionable and nonactionable material is whether or not it is a matter of public concern or "newsworthy," the key distinction in the early privacy cases was whether or not the subject of the disclosure was a public figure. In *The Right to Privacy*, Warren and Brandeis created an exception for press accounts of "public men." The quintessential public men or public figures of the time were public officials, politicians, leaders of industry, inventors, and "teacher[s], preacher[s], or professor[s] in science or art."<sup>81</sup> It was said that public figures "voluntarily injected" themselves into public affairs, and therefore publications should not be liable for printing a limited amount of private information about them because they renounced part, though not all, of their right "to live their lives screened from public observation."<sup>82</sup>

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73. See LANE, *supra* note 26, at 63; Bratman, *supra* note 7, at 646–50.

74. See, e.g., *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 71 (Ga. 1905); *Pritchett v. Bd. of Comm'rs of Knox Cnty.*, 85 N.E. 32, 35 (Ind. App. 1908); *Foster-Milburn Co. v. Chinn*, 120 S.W. 364, 366 (Ky. 1909), *aff'd*, 127 S.W. 476 (Ky. 1910).

75. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009); UTAH CODE ANN. §§ 76-9-401 to -402 (LexisNexis 1953 & repl. vol. 2008); VA. CODE ANN. § 8.01-40 (1950 & repl. vol. 2007) (current penal provision at VA. CODE ANN. § 18.2-216.1); see also PEMBER, *supra* note 38, at 75–76 (discussing the statutory histories of New York, Pennsylvania, Utah, and Virginia's privacy statutes).

76. *Pavesich*, 50 S.E. at 68–69.

77. *Id.* at 69.

78. *Id.* at 70–71.

79. *Id.* at 70.

80. *Id.* at 79.

81. See John Gilmer Speed, *The Right of Privacy*, 163 N. AM. REV. 64, 73–74 (1896).

82. Warren & Brandeis, *supra* note 2, at 215.

A degree of public scrutiny was the tradeoff for the honor, recognition, and power that came with a prominent public position. On this theory, a federal district court, in *Corliss v. E. W. Walker Co.*, denied an injunction sought by a woman against the publication of an illustrated biography of her husband, who had been a famous inventor.<sup>83</sup> Mrs. Corliss argued that her husband was not a public figure.<sup>84</sup> The court disagreed, noting that "[a] statesman, author, artist, or inventor, who asks for and desires public recognition, may be said to have surrendered [his right of privacy] to the public."<sup>85</sup>

But the public figure's waiver of privacy did not warrant unlimited forays into his personal life. Legal commentators of the time argued that there was an inviolable zone of privacy, a domain of intimate life, that belonged to every person regardless of his public status.<sup>86</sup> According to Warren and Brandeis, only information about the public figure's private life that was directly related to his public activities was appropriate for public consumption.<sup>87</sup> In contrast to the modern era, when a good deal of private conduct would be regarded as bearing on one's public deeds, turn-of-the-century America perceived a distinction between "the public side or public relation of a public man" and "his whole personality."<sup>88</sup> A politician's romantic affairs or his home life would be among those activities which, in Warren and Brandeis's words, "have no legitimate connection with his fitness for a public office."<sup>89</sup> As a writer for the legal journal *The Green Bag* argued in 1903, even the President "ought to have the right to go home from the show and be protected from all public molestation by portraiture as he rides hobby horse with his son, plays bear with his children on his knees or rolls over the floor with the baby."<sup>90</sup>

Unauthorized uses of a public figure's name and image in advertisements would thus be actionable as invasions of privacy because the

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83. 64 F. 280 (D. Mass. 1894).

84. *Id.* at 281-82.

85. *Id.* at 282; see also *Schuyler v. Curtis*, 15 N.Y.S. 787, 788 (Sup. Ct. 1891) ("The moment one voluntarily places himself before the public, either in accepting public office, or in becoming a candidate for office, or as an artist or literary man, he surrenders his right to privacy . . . , and obviously cannot complain of any fair or reasonable description or portraiture of himself."), *aff'd*, 19 N.Y.S. 264 (Sup. Ct. 1892).

86. See, e.g., Warren & Brandeis, *supra* note 2, at 216 ("Some things all men alike are entitled to keep from popular curiosity, whether in public life or not . . . ."); *Invasion of Privacy by Photographers*, N.Y. TIMES, Aug. 31, 1902, at 14 ("[E]very individual in private life is entitled to legal protection against undesired publicity . . . .").

87. Warren & Brandeis, *supra* note 2, at 216.

88. See *The Right of Privacy*, 12 VA. L. REG. 91, 97 (1906).

89. Warren & Brandeis, *supra* note 2, at 216.

90. W. Archibald McClean, *The Right of Privacy*, 15 GREEN BAG 494, 496 (1903).

ads had “no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity.”<sup>91</sup> Moreover, in an era before the advent of celebrity culture, which gave prestige to the commercial exploitation of the persona, commercial uses of one’s personality and image were often described as a form of human commodification—“slavery,” as the *Pavesich* court put it.<sup>92</sup> Courts generally did not acknowledge a property right in one’s name and image,<sup>93</sup> but did recognize unauthorized commercial uses of the persona as a dignitary harm. The subject was injured by having her picture and personality associated with a product she did not endorse and put into what was considered a cheap and undignified commercial context.<sup>94</sup> In a 1909 case, *Foster-Milburn Co. v. Chinn*, the Kentucky Court of Appeals held the unauthorized use of a Senator’s name in an advertisement to be an invasion of privacy.<sup>95</sup> While the press might have a right to publish the pictures of prominent public men in the context of the news, there was no right to use their pictures to advertise goods.<sup>96</sup>

In contrast to public figures, the “individual of a purely private character, who ha[d] in no way dedicated [himself] to the public,” did not waive his right to privacy and “ought . . . to be let alone in so much of his life as is his own private concern.”<sup>97</sup> Private citizens were people “who [did] not hold office, who [did] not seek office, . . . and who [did] not engage[ ] in occupations that bring them conspicuously into view.”<sup>98</sup> They shunned “the public gaze, . . . only moving before the public at such times and under such circumstances as may be necessary to [their] actual existence.”<sup>99</sup> The community had no legitimate concern with their affairs; according to Warren and Brandeis, the

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91. Warren & Brandeis, *supra* note 2, at 216.

92. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 80 (Ga. 1905).

93. See George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443, 459 (1991); see also *id.* at 455 (“[C]ommodification of name and likeness had not advanced sufficiently at the turn of the century for judges to conceive of persona as a ‘thing.’”).

94. See Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213, 214, 221 (1999) (noting the right to privacy was intended to “create[ ] and maintain[ ] a legally sanctioned space” beyond the reach of market forces at a time when there was fear about the commodification of everyday life). Commodification “den[ie]d the conditions of individuation necessary to the proper respect for and development of one’s personhood” by rendering the individual a “fungible commodity.” *Id.* at 216, 219.

95. 120 S.W. 364, 365–66 (Ky. 1909).

96. See *Pavesich*, 50 S.E. at 80 (“[I]t cannot be that the mere fact that a man aspires to public office or holds public office subjects him to the humiliation and mortification of having his picture displayed [in advertising].”); *Foster-Milburn Co.*, 120 S.W. at 366.

97. McClean, *supra* note 90, at 497.

98. *No Such Thing as Private Citizen*, CHI. DAILY TRIB., July 27, 1902, at 39.

99. *Pavesich*, 50 S.E. at 70.



point of the law of privacy was "to protect [such] persons . . . from being dragged into an undesirable and undesired publicity."<sup>100</sup> As a New York trial court noted in 1893, "When [individuals] transgress the law, invoke its aid, or put themselves up as candidates for public favor, they warrant criticism, and ought not to complain of it; but, where they are content with the privacy of their homes," they had a right not to be publicized against their will.<sup>101</sup> Even individuals closely connected to public figures, such as their spouses and children, it was argued, did not surrender their right to privacy by virtue of association.<sup>102</sup> While taking pictures of the President in public was not offensive, neither news photographers nor "the public ha[d] the right to snap kodaks at the wife and children of [public figures] the moment they appear[ed] on the street."<sup>103</sup>

Newspapers' increasing attention to the private lives of private citizens had sparked an outcry. In one notorious incident in 1902, a young woman, whose only claim to fame was that her fiancé committed suicide, was publicized in all the major papers.<sup>104</sup> In an 1886 essay titled *Newspaper Espionage*, a writer detailed the anguish suffered by a civic leader when newspapers publicized his daughter's secret marriage.<sup>105</sup> These cases, however, were never brought before the law. Then, as now, potential plaintiffs were often deterred from bringing

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100. Warren & Brandeis, *supra* note 2, at 214.

101. Marks v. Jaffa, 26 N.Y.S. 908, 909-10 (Sup. Ct. 1893) (granting an injunction against a newspaper that had published the plaintiffs' photos in conjunction with a popularity contest in which readers voted for their favorite portrait). In *Schuyler v. Curtis*, where the defendant attempted to erect a statue of a deceased woman philanthropist, the court granted an injunction, concluding that Mrs. Schuyler was not a "public character." 15 N.Y.S. 787, 788 (Sup. Ct. 1891), *aff'd*, 19 N.Y.S. 264 (Sup. Ct. 1892).

102. See *Hillman v. Star Publ'g Co.*, 117 P. 594, 595-96 (Wash. 1911). In *Hillman*, a newspaper was permitted to publish photographs of the daughter of a man who had been arrested for real estate fraud in conjunction with a story about the crime even though she was not involved in it. The decision was widely criticized. Wilbur Larremore, *The Law of Privacy*, 12 COLUM. L. REV. 693, 700 (1912).

103. McClean, *supra* note 90, at 496; see also *The Right to Privacy*, *supra* note 61 ("The families of prominent men have a right to appear in public places without being made the target of cameras unless they are willing.").

104. Letter to the Editor, *The Right of Privacy*, N.Y. TIMES, NOV. 23, 1902, at 30.

105. Joseph B. Bishop, *Newspaper Espionage*, 1 FORUM 529, 535 (1886) ("No newspaper has a right to publish broadcast a matter which belongs to my hearth-stone. . . . [W]hen I am prostrated with grief, it is an outrage upon me as a citizen to have dragged into print a story which I had kept to myself."). Other intrusions that were criticized at the time "included the publication of names of people involved in a supposed scandal, the nature of an anticipated lawsuit, . . . the name of a private guest of a public man, and the details of a marriage proposal by a distinguished politician." GURSTEIN, *supra* note 43, at 154.

privacy suits because doing so would attract further publicity to the upsetting matter.<sup>106</sup>

Many of the reported privacy cases involving private persons in this period did not concern news stories but rather the dignitary harms alleged to be caused by the unauthorized use of photographic portraits in various sorts of advertisements.<sup>107</sup> In a few reported cases, courts held that plaintiffs had a cognizable claim for emotional injuries caused by commercial exploitation of their images.<sup>108</sup> Even in the context of news publications, legal commentators argued, publishing photographs of private figures without consent should be actionable as an invasion of privacy. "Where . . . the subject is a private character, . . . the kodak [should be] forbidden unless it is with permission given," even if the photographs were taken in a public place.<sup>109</sup>

In 1903, in the most famous privacy case of this era, a young woman sought legal action in New York state court to stop the publication of her portrait on posters advertising Franklin Mills Flour.<sup>110</sup> The court in *Roberson v. Rochester Folding Box Co.* acknowledged that although Roberson's photograph was flattering, its display in crass commercial settings, such as "stores, warehouses, [and] saloons," would reasonably subject any modest woman to "mortifying notoriety."<sup>111</sup> Yet the court rejected her claim, stating there was no legal right to privacy and that without a property right, she had no ground for either an injunction or damages.<sup>112</sup> The court concluded that recognizing a right to privacy would open the floodgates of litigation and inundate courts with petty claims.<sup>113</sup> The public and legal community condemned the *Roberson* decision.<sup>114</sup> The *New York Times* was inun-

106. See *The Right to Privacy*, 51 NATION 496, 496 (1890) ("In order to bring his persecutors to justice, he will have to go through a process which will result in an exposure of his private affairs tenfold greater than that originally made by the offending article.").

107. See Armstrong, *supra* note 93, at 459. The last quarter of the nineteenth century saw the rise of a mass market for consumer goods and the beginning of the widespread use of visual depictions in advertisements. See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CALIF. L. REV. 125, 156 (1993) ("Between the end of the Civil War and 1900, total expenditures on advertising soared, multiplying tenfold . . .").

108. See, e.g., *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 80–81 (Ga. 1905); *Foster-Milburn Co. v. Chinn*, 120 S.W. 364, 366–67 (Ky. 1909), *aff'd*, 127 S.W. 476 (Ky. 1910); *Kunz v. Allen*, 172 P. 532 (Kan. 1918).

109. See McClean, *supra* note 90, at 496.

110. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 442 (N.Y. 1902).

111. *Id.* at 442, 450.

112. *Id.* at 447–48.

113. See *id.* at 443.

114. Comment, *An Actionable Right of Privacy?* *Roberson v. Rochester Folding Box Co.*, 12 YALE L.J. 35, 37–38 (1902–1903) (noting the *Roberson* decision "greatly strengthens the claim, advanced by the sensational press of to-day, of a right to pry into and grossly display before the public matters of the most private and personal concern"); see also HIXSON, *supra* note 22, at 39

dated by letters to the editor deploring the outcome of the case. In response, the New York legislature passed a privacy statute making it both a misdemeanor and a tort to use the name or picture of any person "for advertising purposes, or for the purposes of trade" without his written consent.<sup>115</sup> The statutory target of trade purposes, reflecting free press concerns, exempted news publications from liability.<sup>116</sup> The definition of "news" was narrow. To the elites of the time, for whom order and rationality were prized, "news" was not sensational journalism written for the purpose of entertainment, but rather the sort of straightforward, factual material that appeared in serious and staid publications such as the *New York Times*.<sup>117</sup> Yellow journalism, gossip, and human interest stories that focused on personalities and private lives were not "news" under the New York statute, it was often argued, but rather an actionable form of trade or commerce.<sup>118</sup> Warren and Brandeis had envisioned a similar privilege for publications of news or "matters of public and general interest" in the common law privacy action.<sup>119</sup>

In response to the excesses of advertisers and the "scandal-loving press," eight states had recognized a right to privacy by 1910—five at common law and three by statute.<sup>120</sup> At the same time, a few states explicitly rejected a right to privacy, noting the absence of precedent, the difficulties in staking the boundaries of the right, and the law's traditional hesitance to compensate for emotional harms in the absence of a compensable physical injury.<sup>121</sup> As the *Roberson* court observed, the line between public and private figures was difficult, if not

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("The *Roberson* decision 'excited as much amazement among lawyers and jurists as among the promiscuous lay public . . .'" (quoting a *New York Times* editorial)).

115. N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009); see also JNO J. Flynn, Letter to the Editor, *The Right of Privacy*, N.Y. TIMES, July 13, 1902, at 8.

116. See generally Lawrence Edward Savell, *Right of Privacy—Appropriation of a Person's Name, Portrait, or Picture for Advertising or Trade Purposes Without Prior Written Consent: History and Scope in New York*, 48 ALB. L. REV. 1 (1983).

117. See generally SCHUDSON, *supra* note 30, at 186–230 (discussing the debate over informational journalism versus "story journalism" in the 1890s).

118. See *Colyer v. Richard K. Fox Publ'g Co.*, 146 N.Y.S. 999, 1000 (App. Div. 1914); *Jeffries v. N.Y. Evening Journal Publ'g Co.*, 124 N.Y.S. 780, 780 (Sup. Ct. 1910).

119. Warren & Brandeis, *supra* note 2, at 214.

120. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905); *Pritchett v. Bd. of Comm'rs of Knox Cnty.*, 85 N.E. 32 (Ind. App. 1908); *Foster-Milburn Co. v. Chinn*, 120 S.W. 364 (Ky. 1909); *Schulman v. Whitaker*, 42 So. 227 (La. 1906); *Vanderbilt v. Mitchell*, 67 A. 97 (N.J. 1907). By statute: New York, 1909, N.Y. CIV. RIGHTS LAW § 50 (Consol. 1909); Utah, 1909, UTAH PENAL CODE § 8177 (1917); Virginia, 1904, VA. CODE ANN. § 8-650 (West 1904).

121. See *Atkinson v. John E. Doherty & Co.*, 80 N.W. 285, 289 (Mich. 1899); *Henry v. Cherry & Webb*, 73 A. 97, 99–109 (R.I. 1909). Virginia rejected a right of privacy in an unreported case. *PEMBER*, *supra* note 38, at 75. These critiques of the right to privacy are summarized in the work of Herbert Spencer Hadley, the chief scholarly critic of Warren and Brandeis, who argued that

impossible, to draw.<sup>122</sup> Other judges spoke of the absurdity of a right to “privacy in public”: “You might just as well prevent a man from taking and using the picture of another man’s house or of his horse, . . . unless upon consent,” noted one critic.<sup>123</sup> Courts and legal scholars also observed the potential conflict between the right of privacy and the constitutional guarantee of freedom of speech.<sup>124</sup> In *Corliss*, the district court denied the plaintiff an injunction to prevent the publishing of the inventor’s biography, citing freedom of the press.<sup>125</sup> The right to privacy’s threat to freedom of speech and press, however, was not as apparent as it would be in later years. Free speech law was largely undeveloped, and the existing doctrine was largely deferential to the state. Although prior restraints were proscribed, subsequent punishment of speech that had a “bad tendency”—that threatened public order or offended public morals—was generally seen as a legitimate exercise of the police powers.<sup>126</sup> The prevailing position in the legal academy was that freedom of the press did not prohibit the privacy action;<sup>127</sup> as the *Virginia Law Review* noted in 1906, “[T]he constitutional prohibition against passing a law abridging freedom of speech or of the press was not intended to confer a license, without any limitation, to override the rights of others,” including “the right to be left alone.”<sup>128</sup>

### C. *The Turn-of-the-Century Model of Privacy*

At the turn of the twentieth century, courts, critics, and legal academics introduced, defined, and developed the concept of a legal right to privacy—as the *Columbia Law Review* described it, “immunity . . .

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the law should not recognize a right to privacy, only property rights. See Herbert Spencer Hadley, *The Right to Privacy*, 3 NW. U. L. REV. 1 (1894).

122. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 447 (N.Y. 1902) (“Who can draw a line of demarcation between public characters and private characters, let that line be as wavering and irregular as you please?”).

123. J. Flynn, *supra* note 115; see also Hadley, *supra* note 121, at 11–12 (“When an individual . . . walks along the streets in the sight of all . . . , he has waived his right to the privacy of his personality.”).

124. See *Pavesich*, 50 S.E. at 70–71; *Atkinson*, 80 N.W. at 289; *Moser v. Press Publ’g Co.*, 109 N.Y.S. 963, 965–66 (Sup. Ct. 1908).

125. See *Corliss v. E. W. Walker Co.*, 64 F. 280, 282 (D. Mass. 1894).

126. See STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA* 222–23 (2008). The First Amendment was not yet incorporated through the Fourteenth Amendment, and the free speech provisions in most state constitutions were written to reflect the “bad tendency” rule. See David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 523–25 (1981).

127. See, e.g., Annotation, *Injunctions Against Publications Intruding on Privacy*, 43 AM. L. REG. & REV. 134, 139 (1895); McClean, *supra* note 90, at 497; Comment, *An Actionable Right of Privacy?*, *supra* note 114, at 37–38.

128. *Right of Privacy*, *supra* note 88, at 92.

against the use of one's personality for private gain by others, or to feed a prurient curiosity."<sup>129</sup> This turn-of-the-century model of privacy rested on five essential principles.<sup>130</sup> The first was that there was a discernable distinction between public and private figures, and between public and private life. There was a clear "division line in each one's life, over which the public may not step and demand as of right that which is on the other side."<sup>131</sup> The second principle was that mass media publicity was generally unwarranted without consent—explicit for private figures and implicit in the case of public figures, who waived some part of their right to privacy in exchange for a prominent public role and whose activities were often a legitimate matter of public concern.

Yet everyone—both public figures and ordinary people—retained a "zone of privacy" that must not be breached under any circumstance. This was the third principle. The zone of privacy encompassed the home and such personal matters as one's physical condition, family affairs, and intense emotions, like shock and grief. The fourth principle was that the publicity of private lives, particularly of those who were not public figures, was typically not "news"; it served no redeeming social purpose, but merely fed the public's curiosity.<sup>132</sup> The final principle was that the display of private facts in the mass media could inflict serious dignitary and emotional harms to the subject of publicity. Exposure in a mass medium subjected a person, in the words of E.L. Godkin, to "the great pain of believing that everybody he meets in the street is perfectly familiar with some folly, or misfortune, or indiscretion, or weakness, which he had previously supposed had never got beyond his domestic circle."<sup>133</sup> These principles appear to have had substantial public support; there was a "general agreement" among the public, in the words of one legal scholar, that "the time and

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129. Larremore, *supra* note 102, at 693.

130. Ruth Gavison has described several premises essential to Warren and Brandeis's argument:

that press behavior and new technologies of acquisition and dissemination of information present a new threat to privacy, that privacy is very important to the lives of individuals and to the well-being of society, that invasions of privacy could occasionally cause harm and injury as great as those caused by physical or financial loss, that in some cases invasions of privacy by publication serve no legitimate public interest, and that the law should be enlisted to deter this kind of behavior in the same way that it is used to prevent other types of harms.

Gavison, *supra* note 15, at 439–40.

131. McClean, *supra* note 90, at 494.

132. Warren & Brandeis, *supra* note 2, at 218.

133. Godkin, *supra* note 49, at 66.

place were ripe for the invention of a legal theory for enforcement of the right to privacy.”<sup>134</sup>

### III. PRIVACY LAW’S FIRST MODERN ERA, 1920–1950

By the 1940s, popular, scholarly, and judicial views on privacy and its legal protection had become more complex and ambivalent. Though several states recognized the privacy tort, plaintiffs faced relatively poor odds in cases involving media defendants. A confluence of cultural forces undermined the possibility of strong legal protection against unwanted media publicity of one’s person and private affairs. The interwar period saw the rise of consumer culture, the birth of modern celebrity, the proliferation of the mass media, and American culture’s fierce drive to liberate itself from the moral strictures of nineteenth-century Victorianism. One result was a new emphasis on self-expression, emotional release, and the publicity of material once considered too personal for public view. Voyeuristic and exhibitionist themes and impulses—peering in on others’ lives and putting oneself on display—began to suffuse the culture. A right to privacy in many ways conflicted with this movement toward greater exposure.

It was also in tension with new ideas about the social function of the press. In a nation bound together by the mass media and in the thrall of celebrity culture, gossip and stories about personalities and private lives were increasingly regarded not as a social evil but as a benign form of modern storytelling, the “printed folklore of the factory age.”<sup>135</sup> In this period, free speech law was also substantially developed and liberalized; freedom of the press began to be cast in terms of the public’s right to access news and information on a broad range of “matters of public concern.”<sup>136</sup> Courts began to suggest that there were both social disadvantages and constitutional difficulties with a right to privacy that would cover the sorts of media publications that Warren and Brandeis found offensive. The public’s “right to know” would surpass the individual’s “right to be let alone.”

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134. Glancy, *supra* note 27, at 7. As Benjamin Bratman wrote, “It seems beyond dispute that at the dawn of the twentieth century, the American legal community and lay public zealously supported the enactment of legal protection for their privacy.” Bratman, *supra* note 7, at 650. For a good summary of the articles and letters to the editor in the *New York Times* supporting a right to privacy between 1890 and 1910, see *id.* at 647–50. There were only two articles in legal journals that expressly opposed the right of privacy. See Hadley, *supra* note 121; Denis O’Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902). For supportive pieces in the legal press, in addition to those previously cited, see *The Right to Privacy*, 6 GREEN BAG 498 (1894), and *The Right to Privacy*, 3 GREEN BAG 524 (1891).

135. HUGHES, *supra* note 32, at 103.

136. *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940).

*A. The Modern Culture of Exposure**1. The Ethos of Exposure*

In the early twentieth century, the United States experienced a social upheaval—a “revolution in manners and morals”<sup>137</sup>—that broke down the strict barriers between public and private that had characterized nineteenth-century culture.<sup>138</sup> Feminists and so-called sex radicals had spoken out against the “conspiracy of silence” around sex and urged the frank discussion of birth control and other intimate matters.<sup>139</sup> Mass consumer culture and the burgeoning advertising industry celebrated inner desires and impulses.<sup>140</sup> By the 1920s, many subjects formerly taboo had been woven into the fabric of popular discourse. The earlier ideal of emotional suppression and self-disciplined individualism was eclipsed by a new emphasis on self-fulfillment, emotional freedom, and personal expression.<sup>141</sup>

This convergence of the intimate and the social led to a new idealized model of self-presentation. Popular advice manuals no longer stressed the importance of concealing one’s emotions, but rather publicly manifesting one’s inner self, one’s so-called “personality,” by being open and candid.<sup>142</sup> The personality ideal was driven by the rise of the movies and the movie star in the early twentieth century. Because of the cinema’s realism, actors appeared natural, authentic, and intimate on the screen. With their apparent ability to charismatically express their inner selves to a mass audience, motion picture actors became exemplars of personality, and they were emulated by millions of fans.<sup>143</sup>

Personality and the public display of private life became the basis of modern fame. While nineteenth-century public figures had been noted for their productive achievements, modern fame more often celebrated a person’s lifestyle, idiosyncrasies, and personal traits.<sup>144</sup>

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137. FREDERICK LEWIS ALLEN, *ONLY YESTERDAY: AN INFORMAL HISTORY OF THE NINETEEN-TWENTIES* 88 (1931).

138. See LYNN DUMENIL, *THE MODERN TEMPER: AMERICAN CULTURE AND SOCIETY IN THE 1920s*, at 12–13 (1995).

139. See GURSTEIN, *supra* note 43, at 68–77.

140. See generally STUART EWEN, *CAPTAINS OF CONSCIOUSNESS: ADVERTISING AND THE SOCIAL ROOTS OF THE CONSUMER CULTURE* (1976); JACKSON LEARS, *FABLES OF ABUNDANCE: A CULTURAL HISTORY OF ADVERTISING IN AMERICA* (1994); ROLAND MARCHAND, *ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY, 1920–1940* (1985).

141. See LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 35–41 (1990).

142. SUSMAN, *supra* note 44, at 277.

143. See generally *id.* at 35–58.

144. See DANIEL J. BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* 59 (1961).

By 1927, the celebrity pantheon, as reflected in the typical content of the Sunday issue of the *New York Times*, included not only movie stars, but Broadway producers, literary figures, socialites, athletes, baseball team owners, screenwriters, and chefs, among others.<sup>145</sup> Their notoriety was not only a function of their accomplishments, but even more, their interesting personalities and private lives.<sup>146</sup> As the *New York Times* noted in 1920, stars were defined as those who only had “to confine themselves to one role—that of being themselves.”<sup>147</sup> Exposing aspects of one’s inner self and intimate life to public view was considered a significant and desirable part of constructing a public identity.

## 2. *The Media of Exposure*

This new spirit of self-exposure was enhanced by new industries and media of exposure. The change in popular, intellectual, and judicial attitudes toward privacy cannot be understood without reference to the tremendous expansion of the mass media. Newspaper circulation increased from 22.4 million copies a day in 1910 to 39.6 million copies in 1930.<sup>148</sup> News and entertainment continued to blur, and human interest journalism gained in popularity. Motion pictures attracted 95 million viewers each week by the end of the 1920s,<sup>149</sup> and radios became a presence in most American homes by the 1930s.<sup>150</sup> By the time of the Great Depression, the trend that had so troubled Warren and Brandeis had become a defining feature of American culture: vast amounts of newspaper space, dozens of magazine titles, radio broadcasts, and movie newsreels were devoted to information and stories about personal lives.

It was not only entertainment stars whose private lives were put on display. A writer noted in 1920 that people were no longer as interested in finding out what the President thought about such public issues as taxation as they were in his eating and grooming habits.<sup>151</sup> If a person assumed office or “buil[t] a better mousetrap than his neigh-

145. PONCE DE LEON, *supra* note 34, at 47–48.

146. BOORSTIN, *supra* note 144, at 65; LEO LOWENTHAL, *LITERATURE, POPULAR CULTURE, AND SOCIETY* 118–23 (Pac. Books 1968).

147. *Actors and Stars*, N.Y. TIMES, Apr. 25, 1920, at 4.

148. LYN GORMAN & DAVID MCLEAN, *MEDIA AND SOCIETY INTO THE 21ST CENTURY* 24 (2d ed. 2009).

149. *THE AMERICAN CENTURY: CONSENSUS AND COERCION IN THE PROJECTION OF AMERICAN POWER* 255 (David Slater & Peter James Taylor eds., 1999).

150. Tom Lewis, “A Godlike Presence”: *The Impact of Radio on the 1920s and 1930s*, MAG. HIST., Spring 1992, at 26, 29.

151. Ed Streeter, *No Such Word as “Privacy” in the Lexicon of Presidential Candidates*, WASH. POST, Oct. 24, 1920, at 61.



bor,” noted a writer in 1935, the media “will make newsreels of him and his wife in beach pajamas, it will discuss his diet and his health, . . . it will publicize him, analyze him, photograph him, and make his life thoroughly miserable by feeding to the palpitant public intimate details.”<sup>152</sup> Standard fare in reporting on public figures, by today’s standards, was still relatively innocuous; although marriages and divorces were reported, sexual affairs were generally off limits.<sup>153</sup> More commonly, news consisted of what the public figure ate for breakfast and “whether or not he sleeps in pajamas.”<sup>154</sup> These details nonetheless gave audiences a much-desired feeling of intimacy with the subject and the thrill of peering in on another’s private life.

Personality journalism was also beginning to delve more deeply into the lives of average citizens. The proverbial man on the street faced the possibility of finding himself the subject of media attention by virtue of appearing interesting, bizarre, or simply “real.” There developed an extraordinary public fascination with the lives of ordinary people;<sup>155</sup> publishers appealed to a mass audience with stories to which they could relate. As that era’s shrewdest observer of the press, critic Walter Lippmann wrote, “News which does not offer [the] opportunity to introduce oneself into the struggle which it depicts cannot appeal to a wide audience. The audience must participate in the news, much as it participates in the drama, by personal identification.”<sup>156</sup> This was the principle behind two of the period’s most successful publishing genres: the tabloid and the confessional magazine.<sup>157</sup>

152. Newman Levy, *The Right to Be Let Alone*, 35 AM. MERCURY 190, 197 (1935).

153. See generally SAMANTHA BARBAS, *THE FIRST LADY OF HOLLYWOOD: A BIOGRAPHY OF LOUELLA PARSONS* (2005).

154. STUART EWEN, *ALL CONSUMING IMAGES: THE POLITICS OF STYLE IN CONTEMPORARY CULTURE* 93 (1988).

155. See Mitchell Dawson, *Paul Pry and Privacy*, 150 ATLANTIC MONTHLY 385, 385 (1932) (“‘A spirit of inquiry’ has indeed become the characteristic of the age we live in. The art of minding other people’s business . . . has developed into a major industry, thanks to our modern mechanical equipment.”).

156. Randall P. Bezanson, *Public Disclosures as News: Injunctive Relief and Newsworthiness in Privacy Actions Involving the Press*, 64 IOWA L. REV. 1061, 1071 (1979) (alteration in original) (quoting WALTER LIPPMANN, *PUBLIC OPINION* 355 (1945)). As Edward Bloustein would presciently observe many years later:

A news story about a love triangle murder is more satisfying to the public’s prying and prurient instincts . . . if the individuals concerned are named and identified. This is true, curiously enough, even when the people concerned are not well-known or known at all to the reader, as long as the identification rings true.

EDWARD J. BLOUSTEIN, *INDIVIDUAL AND GROUP PRIVACY* 84 (1978).

157. See Silas Bent, *Journalistic Jazz*, 122 NATION 341 (1926) (discussing the tabloid genre). Tabloids in New York in the 1920s circulated to more than 1.5 million readers. GORMAN & McLEAN, *supra* note 148, at 25.

In 1890 relatively few publications were equipped with the facilities and personnel required for reporting and publishing human interest stories, but thirty years later, virtually all major newspapers offered expansive feature sections and multiple gossip columns, illustrated with photographs.<sup>158</sup> Photojournalism began to develop as a genre, and in newspapers and magazines, the public was inundated with visual advertising.<sup>159</sup> Celebrity product endorsements, with stars hawking items of personal consumption, blurred the boundaries between the public, the intimate, and the commercial.<sup>160</sup> The images—of faces, bodies, and candid expressions—that Warren and Brandeis had characterized as deeply personal had become part of the public landscape, appearing on billboards, product packaging, and movie screens.

### 3. *The Necessity of Exposure*

For fame-seekers and the star struck, exposure of one's image and private life to a wide audience had become a fantasy.<sup>161</sup> For every American, to a certain extent, it had become a "consequence of modern life."<sup>162</sup> This was an era when the average person was getting used to both more and less privacy than in the past. Compared to life in the small towns of the nineteenth century, the modern city dweller had become accustomed to a substantial amount of isolation. He lived in close proximity to his neighbors, yet at the same time, he was often a stranger to them. New communication technologies and the provision of social services by government institutions made it possible to function with a relative amount of anonymity, without deep involvement in, or dependence on, an intimate community. At the same time, those technologies and institutions enabled—even compelled—one to publicly expose increasing amounts of information about one's private life.

The establishment and growth of the administrative state in this period depended on large repositories of personal data.<sup>163</sup> Through the administration of the income tax, the census, and other surveys of social and economic conditions, the federal government began to collect

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158. See Gerald W. Johnson, *Freedom of the Newspaper Press*, 200 ANNALS AM. ACAD. POL. & SOC. SCI. 60, 66–67 (1938).

159. See Armstrong, *supra* note 93, at 458.

160. Charles Eckert, *The Carole Lombard in Macy's Window*, in *MOVIES AND MASS CULTURE* 95, 116–17 (John Belton ed., 1996).

161. A study of the aspirations of adolescent girls in 1924 showed that most of them wanted to be famous. EWEN, *supra* note 154, at 95.

162. Thomas F. Woodlock, *Thinking It Over: Invasion of Privacy Held a Consequence of Modern Life*, WALL ST. J., Mar. 13, 1936, at 2.

163. See *No Such Thing as Private Citizen*, *supra* note 98, at 39.

vast quantities of private information.<sup>164</sup> The new marketing and public relations departments of major corporations amassed statistics on potential customers, and the burgeoning fields of academic social science depended on data collection and analysis.<sup>165</sup> The use of intelligence, personality, and vocational aptitude tests was becoming routine among government and private employers.<sup>166</sup> The average person now had to “pour[ ] a constantly flowing stream of information about himself into the record files—birth and marriage records, public-school records, census data, military records, . . . public-health records, . . . income-tax returns, . . . bank records, . . . telephone records.”<sup>167</sup> It was during this time that humorist Irvin S. Cobb coined the phrase, “No more privacy than a goldfish.”<sup>168</sup>

These “invasions of privacy” were regarded with both resentment and resignation. As one *Chicago Tribune* writer lamented in 1925, “If some one sees you in an automobile all he needs is the license number to find out if you are the owner. . . . He can search the records and see what real estate you own . . . and personal taxes you pay.”<sup>169</sup> “It grows increasingly difficult, year by year, for any man to conserve his privacy without alienating his friends,” wrote a contributor to *Forum* magazine.<sup>170</sup> “We have all become so accessible, by telephone, by telegraph, or by post, that we are at the mercy of almost anyone who chooses to make a demand upon our time.”<sup>171</sup> Yet at the same time, the public widely accepted these incursions into the private sphere as necessary to communicate, “to help science, and to help society run efficiently.”<sup>172</sup> Eliminating the credit bureaus, the tax collectors, and

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164. See LANE, *supra* note 26, at 108–09. As one writer noted in 1939:

[T]he Federal Government last year sent out 135,000,000 questionnaires seeking exhaustive data on . . . the personal habits, condition, and conduct of citizens. . . . The government got intimate glimpses into the private lives of the other half by scanning the annual income-tax reports . . . . Each state, city, and county relief board . . . has snooped into tenement squalor to document the misery of millions of the nation's poor who are on relief.

Berger, *supra* note 13, at 16.

165. See Robert Benchley, *The Questionnaire Craze*, CHI. SUNDAY TRIB., Feb. 9, 1930, pt. 7, at 4; Shils, *supra* note 42, at 298–99.

166. See Shils, *supra* note 42, at 295–96.

167. *Id.* at 159; see also David Lawrence, *The Lost Right of Privacy*, 38 AM. MERCURY 12, 12–13 (1936).

168. Theodore P. Taylor, *Privacy, Goldfish and Cinema Queens*, L.A. TIMES, Aug. 4, 1918, at III.17. Americans, George Bernard Shaw noted in 1933, “ha[d] no sense of privacy. . . . There is no such thing in the country.” *Preface to JOURNALISM AND THE DEBATE OVER PRIVACY*, at vii (Craig L. LaMay ed., 2003).

169. Robert L. Floyd, *Privacy*, CHI. SUNDAY TRIB., Sept. 27, 1925, pt. 1, at 8.

170. Robert J. Shores, *A Plea for Privacy*, 51 FORUM 425, 426–27 (1914).

171. *Id.* at 427.

172. WESTIN, *supra* note 16, at 159.

the survey takers would certainly increase the amount of privacy held by the average citizen, quipped one writer, but it would leave society with little else.<sup>173</sup>

These were the modern paradoxes of privacy. City living—something experienced by over half of Americans by the 1930s—in some ways produced too much closeness, a new sensitivity to privacy, and a desire to retreat from others. At the same time, the vast and anonymous city of strangers created a sense of aloneness, which led to a desire to know about the intimate lives of others and to connect with others by selectively putting one's own private affairs out in the open. Modern urban life, lacking the tight-knit social networks that existed in small communities, required artificial, centralized mechanisms for gathering and disseminating information on a large scale. The ubiquitous radio and telephone may have made it difficult to withdraw from public life, yet without them, communication in a mass society might well be impossible. The challenge of the age—as it has been ever since—was to balance these interests and mediate these tensions. It was against this backdrop that the law of privacy developed.

### *B. The Law of Privacy and Exposure*

Between 1920 and 1950, an increasing number of states recognized a right to sue over unwanted and embarrassing publicity of one's image or private life. By 1950, over twenty states acknowledged some version of the privacy tort.<sup>174</sup> Despite this, the law was evolving in ways that disfavored privacy claimants. The earlier views that a public figure was entitled to keep much of his private activity out of the papers and that a private citizen should have a strong, if not near-absolute, right to stay out of the media spotlight were often described as incompatible with the needs and demands of modern life. So, too, was the notion of neat divides between public and private life, and the concept of "privacy in public." In a series of cases beginning in the 1930s, the spirit of the emerging culture of exposure was written into the law.

Four central assumptions underlay the modern law of privacy, principles which were largely antithetical to the earlier position. The first was that there could not and perhaps should not be a right to privacy

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173. *No Such Thing as Private Citizen*, *supra* note 98, at 39.

174. Alabama, Alaska, Arizona, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Washington, D.C., and Wisconsin recognized the privacy tort at common law. New York, Virginia, and Utah recognized the privacy tort by statute. California recognized the privacy tort under the state constitution. See PEMBER, *supra* note 38, at 264–66.

in public places; given journalistic practices and the state of modern photographic technologies, one assumed the risk of media publicity whenever she set foot outside the home. The second was that every person waived much of her right to privacy by doing nothing more than participating in the ordinary doings of daily life, so long as the press found those activities "newsworthy." The third principle had to do with the cultural significance of popular journalism, and why freedom of speech demanded its relatively free and unfettered circulation. The fourth concerned the harms caused by unwanted mass media exposure. Because celebrities had become objects of emulation and fantasy, and because modern living demanded of everyone a certain degree of self-exposure, it was said that the average person would usually not be injured by the display of her photo, and even her personal affairs, before a mass media audience.

### 1. *No Privacy in Public*

In Massachusetts in 1934, two robbery victims were photographed by a newspaper cameraman as they were talking to the police on the street.<sup>175</sup> The photo appeared on the front page of the newspaper.<sup>176</sup> The victims sued the newspaper for invasion of privacy and lost.<sup>177</sup> In another case, a lawyer who had helped the police in a murder case was photographed by a newsreel cameraman when she was sitting in the front seat of the police car.<sup>178</sup> She lost her privacy suit against the film company.<sup>179</sup> No longer did the earlier notion prevail "that the kodak is forbidden unless it is with permission given."<sup>180</sup> The new rule was that everyone assumed the risk of being captured on film and publicized in the media whenever in a public space.<sup>181</sup> Appearing in a location where one could be seen by the naked eye was effectively consent to being seen by film viewers, magazine consumers, and newspaper readers.

This position reflected, in part, the advent of photojournalism, which was a product of technological developments in taking and publishing photographs. In 1928, Dr. Erich Salomon introduced what was

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175. *Themo v. New Eng. Newspaper Publ'g Co.*, 27 N.E.2d 753, 753 (Mass. 1940).

176. *Id.*

177. *Id.* at 755.

178. *Humiston v. Universal Film Mfg. Co.*, 178 N.Y.S. 752, 755 (App. Div. 1919).

179. *Id.*

180. McClean, *supra* note 90, at 496.

181. This did not apply to the media's exploitation of the persona for advertising purposes, which was still viewed unsympathetically by the courts, particularly when it involved nonpublic figures. See, e.g., *McNulty v. Press Publ'g Co.*, 241 N.Y.S. 29 (Sup. Ct. 1930); *Semler v. Ultem Publ'ns*, 9 N.Y.S.2d 319 (City Ct. 1938).

known as the "candid camera," with a fast lens and flash bulb.<sup>182</sup> The candid camera enabled an aggressive paparazzi, which became notorious for its "hounding, spying, bribing, stealing, [and] camera-clicking."<sup>183</sup> This, combined with improved techniques for printing photographs, birthed the new genre of "pictorial journalism." By the end of the 1930s, several significant national publications, including the popular magazines *Life* and *Look*, were devoted to reporting the news through photographs.<sup>184</sup> Almost all of the nation's approximately 17,000 movie theaters showed newsreels prior to the feature film.<sup>185</sup> As a result of photojournalism and the newsreel, the "picture [was] more powerful than the word in the society of today."<sup>186</sup>

The "invariable concomitant" of this genre of journalism was the "invasion of privacy."<sup>187</sup> As a writer noted in 1939, no prominent person was safe from the "prying eyes of the candid camera."<sup>188</sup> This comment followed the notorious press coverage of the aviator and popular hero Charles Lindbergh. In one of the more sordid episodes of his stalking, reporters followed him and Mrs. Lindbergh on their honeymoon and for eight hours circled around a boat on which they were sailing, trying to take a picture.<sup>189</sup> As one journalist commented, the candid camera allowed the public to see "important personages as they really were, not as they wanted to be seen," delighting both audiences and editors.<sup>190</sup>

The danger of being caught on film had become real, not only for celebrities but for ordinary people as well. In pursuit of material for human interest stories, journalists and cameramen patrolled the city seeking interesting material: accidents, crimes, and unusual faces. The staple of the movie newsreel was the ubiquitous street scene, in which unsuspecting subjects were photographed, often in close-up, for dis-

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182. H. L. Smith, *The News Camera on Trial*, 98 F. & CENTURY 267, 267 (1937).

183. Leon R. Yankwich, *The Right of Privacy: Its Development, Scope and Limitations*, 27 NOTRE DAME LAW. 499, 525 (1952) (quoting Crosman, *Freedom of the Press in 1930*, W. PUBLISHER, no. 17, 1930, at 7, 17).

184. Berger, *supra* note 13, at 20.

185. MARGARET FARRAND THORP, *AMERICA AT THE MOVIES* 20 (1939).

186. Harry Shaw, *Pocket and Pictorial Journalism*, 243 N. AM. REV. 297, 302 (1937).

187. Silas Bent, *The Invasion of Privacy*, 224 N. AM. REV. 399, 405 (1927); see also Donald S. Baldwin, *If Your Photograph Were News*, 4 NOTRE DAME LAW. 382, 382 (1929) ("As time goes on we notice an increasing tendency [sic] on the part of the newspapers of the country to illustrate their stories, shady and otherwise, with photographs of the principal characters. This, coupled with the growth of the tabloids, has unloosed upon the populace of our country a great army of men armed with the latest inventions for taking the photograph of willing or unwilling subjects, whose battle cry seems to be, 'get your photograph.'").

188. Berger, *supra* note 13, at 16.

189. Mitchell Dawson, *Law and the Right of Privacy*, 67 AM. MERCURY 397, 398 (1948).

190. Smith, *supra* note 182, at 269.

play on the big screen. As the *New York Times* observed in 1931, "No longer is it necessary to be spectacular . . . in order to face the camera. Now the newsreel companies search out their own material, and youth, going for a stroll in the park, may suddenly find [themselves] as part of a human interest sequence called 'Under a Lovers' Moon.'"<sup>191</sup> In theory, one's "home is still his castle," noted one lawyer in 1948. There, a person "[did not] have to answer the door-bell or telephone; he can pull down the shades; he can hide like a grub under a stone. But when he ventures out he is clearly off base and fair game for any snooper who thinks him 'newsworthy.'"<sup>192</sup>

Given this state of affairs, courts and commentators often concluded that every person, from the unknown to the celebrity, assumed the risk of being photographed when in public.<sup>193</sup> As the *Restatement (First) of Torts* summarized, "One who is not a recluse" could not avoid being seen by others in connection with "the ordinary incidents of community life of which he is a part," including "the possibility that he may be photographed as a part of a street scene."<sup>194</sup> It was on this theory that in 1939, the California Supreme Court held that the husband of a woman who committed suicide by jumping off a building in downtown Los Angeles had no cause of action against the *Los Angeles Examiner* when the paper published a photo of her body.<sup>195</sup> The court observed that the woman had waived her right to privacy by virtue of committing suicide in a public place.<sup>196</sup>

She went to a public edifice in the heart of a large city and there ended her life by plunging from such [a] high building. It would be difficult to imagine a more public method of self-destruction. . . . It was her own act which waived any right to keep her picture from public observation in connection with the news account of her suicide.<sup>197</sup>

We can see this "no privacy in public" position as an attempt, albeit imprecisely, to describe the actual workings of the media in an age of photojournalism. It also reflected the somewhat ominous sense of

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191. Lewis Nichols, *Our Sacred Privacy Becomes a Memory*, N.Y. TIMES MAG., Oct. 11, 1931, § 5, at 8.

192. Dawson, *supra* note 189, at 397.

193. See Smith, *supra* note 182, at 269-70. But see *id.* at 270 ("In the spring of 1930, two photographers of the *Chattanooga Times* were fined \$100 each for taking a picture of a defendant in a trial in Lafayette, Georgia. The conviction was not for contempt of court but on the theory that 'no newspaper has the right to publish a photograph of anyone without previously securing the consent of that person.'").

194. RESTATEMENT (FIRST) OF TORTS § 867 cmt. c (1939).

195. *Metter v. L.A. Exam'r*, 95 P.2d 491, 493-96 (Cal. Dist. Ct. App. 1939).

196. *Id.* at 496.

197. *Id.*

media surveillance felt by much of the public at the time; life was often described as lived “before the spotlight,” and “the klieg lights spare nobody, high or low.”<sup>198</sup> The normative rationale for the doctrine, as will be discussed, was rooted in concerns with freedom of the press. It was feared that a right to privacy in public places would exert an inhibitive effect on publishing, impairing the public’s ability to access the news through the media of mass communications.

## 2. *The Waiver of Privacy*

### a. Public Figures

As we have seen, the typical public figure of the Warren and Brandeis era had been renowned for his productive, substantive achievements,<sup>199</sup> and he waived his right to privacy over his personal affairs to the extent necessary for the public to appraise his public activities. The culture of that time tended to view public selves and private selves as separate and distinguishable, so relatively little information about private life was considered relevant to one’s public deeds.

Half a century later, this view had changed. Because modern fame was often a function of the public’s interest in one’s personal traits and lifestyle, the public figure was considered to have waived her right to privacy over much of her personal life. Her personality and private affairs were, in many cases, the very basis of her notoriety. To become a celebrity, particularly an entertainment star, one had to show off her “inner self,” and, as a California appellate court noted in 1931, “There can be no privacy in that which is already public.”<sup>200</sup>

The social contract of fame now required a much greater commitment on the part of the public figure. In return for his social position, he was required to sustain much deeper public and journalistic forays into his private life. As the *Restatement (First) of Torts* summarized, “he must necessarily pay the price of even unwelcome publicity through reports upon his private life and photographic reproductions of himself and his family, unless these are defamatory.”<sup>201</sup> Courts described the celebrity as having dedicated her life, including her private life, to the public. Her personal affairs were “public property.”<sup>202</sup> Public figures’ “biographies [could] be written, and their life histories

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198. *The Passing of Privacy*, WASH. POST, June 30, 1936, at 8.

199. As historian Daniel Boorstin observed, to become famous one “had to be something of a hero; . . . admired for his courage, nobility, or exploits.” BOORSTIN, *supra* note 144, at 46 (internal quotation marks omitted).

200. *Melvin v. Reid*, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931).

201. RESTATEMENT (FIRST) OF TORTS § 867 cmt. c (1939).

202. *Martin v. New Metro. Fiction, Inc.*, 248 N.Y.S. 359, 362 (Sup. Ct. 1931).



and their characters set forth before the world in unflattering detail” without invading their privacy.<sup>203</sup>

The most famous iteration of this position was *Sidis v. F-R Publishing Corp.* in 1940. The Second Circuit held that William James Sidis, a former child prodigy, had waived his right to privacy over embarrassing personal information published in *The New Yorker*.<sup>204</sup> In the early twentieth century, Sidis’s feats of genius, including teaching math at Harvard University at age eleven, had been widely publicized in the press.<sup>205</sup> In 1937, when Sidis was thirty-nine years old, *The New Yorker* published a “where are they now” article on him, which described in detail his life in a shabby one-room apartment and his odd habits, including his obsession with streetcar transfers and an obscure Indian tribe.<sup>206</sup> Sidis sued the publisher of *The New Yorker* for invasion of privacy.<sup>207</sup> The U.S. District Court for the Southern District of New York dismissed the privacy count, and the Second Circuit affirmed.<sup>208</sup>

The Second Circuit admitted that the article was “merciless in its dissection” of the details of Sidis’s private life; however, Sidis’s privacy had not been invaded.<sup>209</sup> Sidis had willingly opened himself up to media attention as a child prodigy and thus waived his right to privacy over not only information about his public accomplishments, but virtually any personal matters that interested the public.<sup>210</sup> Sidis had dedicated his life to the public, and when he attracted media attention for his childhood feats, his life became the possession of the people.

The public figure’s alleged waiver of privacy extended not only to informational publications, but also, in some cases, to advertising. Though commercial uses of personal images were no longer stigmatized—being a celebrity endorser or professional model had become quite prestigious—there was not yet a right of publicity, a property right in the commercial value of one’s personality.<sup>211</sup> Public figures whose names and images had been appropriated for commercial uses often sued under the right of privacy and had to claim dignitary harm

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203. Prosser, *supra* note 8, at 417 (footnote omitted); *see also* Jeffries v. N.Y. Evening Journal Publ’g Co., 124 N.Y.S. 780 (Sup. Ct. 1910).

204. *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940).

205. *Id.* at 807.

206. *Id.*

207. *Sidis v. F-R Publ’g Corp.*, 34 F. Supp. 19, 20 (S.D.N.Y. 1938), *aff’d*, 113 F.2d 806 (2d Cir. 1940).

208. *Id.* at 25.

209. *Sidis*, 113 F.2d at 807, 809.

210. *Id.* at 809.

211. *See generally* Armstrong, *supra* note 93.

even though their true grievance may have been pecuniary. In a shift from the prevailing position in the earlier period, courts frequently concluded that public figures could not recover for such injuries because they had willingly sought or consented to publicity, and that the circulation of their names and images was the basis of their fame. In *Martin v. F.I.Y. Theater Co.*, the plaintiff was a respected film actress whose picture was displayed in an advertisement on the front of a local burlesque house without her consent.<sup>212</sup> The court sustained the defendant's motion to dismiss, noting that "any person following the theatrical business for a life's work has no such right of privacy."<sup>213</sup> Actors could not claim a right of privacy "because their productions, faces and names are sold to the public."<sup>214</sup>

b. Matters of "Public Interest"

The first principle of human interest journalism was that reality was more interesting than fiction. To this end, publishers routinely vaunted ordinary people before the spotlight, often against their will. The personal stories and pictures of average citizens were routinely paraded before the public in dramatic stories announced with screaming headlines.<sup>215</sup> As one critic noted, "If fate brings [one] tragedy, pain or even extraordinary luck, his private life will surely be served up hot and steaming . . . ."<sup>216</sup> The papers were filled with human interest stories about persons whose connection to important matters was "of the slightest."<sup>217</sup>

In this environment, where ordinary people could become overnight celebrities, the line between public and private figures had blurred. Recognizing the difficulty of distinguishing between the two—and that fame had become "a mysterious thing [that] frequently concentrates most heavily on those least deserving of attention"<sup>218</sup>—courts adopted a purely descriptive definition of the public figure: a

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212. 10 Ohio Op. 338, 339 (Ct. Com. Pl. 1938).

213. *Id.* at 340 ("Persons who expose themselves to public view for hire cannot expect to have the same privacy as the meek, plodding stay-at-home citizen."). "[The right of privacy] does not exist . . . where the person has become prominent, notorious or well known so that by his very vocation or conduct he has dedicated his life to some continued contact with the public and thereby has waived his right to privacy." *Id.* at 341; see also RESTATEMENT (FIRST) OF TORTS § 867 cmt. c (1939).

214. *Paramount Pictures, Inc. v. Leader Press, Inc.*, 24 F. Supp. 1004, 1007 (W.D. Okla. 1938), *rev'd*, 106 F.2d 229, 232 (10th Cir. 1939).

215. See generally NANCY BARR MAVITY, *THE MODERN NEWSPAPER* 33–36 (1930).

216. Dawson, *supra* note 189, at 405.

217. See generally *id.* at 398, 401, 404–05.

218. Louis Nizer, *The Right of Privacy: A Half Century's Developments*, 39 MICH. L. REV. 526, 540 (1941).

person who had been publicized. "Thus, . . . criminals, prize fighters, fan dancers and people who try to set endurance records" were considered public figures,<sup>219</sup> as were ordinary people who happened to get their names or pictures in the press. Like traditional public figures—those who had actively sought a public career—the involuntary celebrity or "instant celebrity" was said to have waived much of her right of privacy over her image and personal affairs. Where the press had "thrust upon [a person], public notoriety, he relinquishes the right to live . . . free from public scrutiny."<sup>220</sup> To retain the fiction of a consensual waiver of rights, courts suggested that one assumed the risk of publicity by participating in a society with a mass media fascinated with the "real lives" of ordinary people. Every person assumed the risk of publicity by doing nothing more than conducting normal daily activities so long as the press or the public found them interesting.<sup>221</sup>

Many privacy cases in this period were brought by instant celebrities in connection with crime reporting. In the 1920s, the press—both the tabloids and the mainstream papers—became notorious for sensational crime stories. Crime stories, of course, were nothing new. What was different about the modern coverage was that whereas the victim and the criminal had usually monopolized newspaper attention in the past, the spotlight was now "sure to be turned upon all important witnesses and [extended] to persons only remotely connected with the crime."<sup>222</sup> In several instances, these figures were held by courts to have waived their right to keep out of the news. In 1929, the Court of Appeals of Kentucky held that a woman who witnessed her husband's killing on the street had no cause of action against the local paper for publishing a picture of her.<sup>223</sup> The woman argued that because she was not a "public figure," having never sought the spotlight, she had a right to live an unpublicized life.<sup>224</sup> The court held that when she went out on the street, she assumed the risk of becoming involved in an event of "public interest" and, consequently, the risk of publicity.<sup>225</sup>

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219. *Id.* at 540–41.

220. *Smith v. NBC*, 292 P.2d 600, 603 (Cal. Dist. Ct. App. 1956).

221. "The preponderance of authority . . . seems to sustain the view that . . . a person who . . . , whether willingly or not, becomes an actor in an occurrence of public or general interest" has waived his right to privacy. *Martin v. Dorton*, 50 So. 2d 391, 393 (Miss. 1951).

222. *Johnson*, *supra* note 158, at 67. "[W]itnesses are pilloried as liars and scoundrels, and the close relatives of the defendants suffer an odium which they can never quite live down." *Dawson*, *supra* note 155, at 386.

223. *Jones v. Herald Post Co.*, 18 S.W.2d 972, 973 (Ky. 1929).

224. *Id.*

225. *Id.*

One also waived one's right to keep one's name or image out of the media by participating in ordinary activities, such as exercise classes or working as a waitress, so long as they aroused public interest.<sup>226</sup> In a 1936 case involving unauthorized newsreel footage taken of a woman in an exercise course for overweight women, the district court described the footage as newsworthy and a matter of public interest.<sup>227</sup> The plaintiff assumed the risk of publicity by taking part in an activity that amused and titillated the public, if not attracted its legitimate interest. The court concluded:

While it may be difficult in some instances to find the point at which the public interest ends, it seems reasonably clear that pictures of a group of corpulent women attempting to reduce with the aid of some rather novel and unique apparatus do not cross the borderline, at least so long as a large proportion of the female sex continues its present concern about any increase in poundage.<sup>228</sup>

In *Berg v. Minneapolis Star & Tribune Co.*, the court rejected a privacy claim against a newspaper that had written about a man's family and marital life and published a picture of him taken during his child custody proceeding.<sup>229</sup> When he filed for custody, he waived his right to live a "quiet peaceful life free from the prying curiosity and unmitigated gossip which accompanies fame, notoriety and scandal" and had become "a quasi-public figure in the community."<sup>230</sup> As was the case with traditional public figures, the private lives of these instant or involuntary public figures were described as the possession of the public. As a New York appellate court explained, "Even private social affairs and prevailing fashions involving individuals who make no bid for publicity are, by custom, regarded as public property . . ."<sup>231</sup>

Given prevailing journalistic practices, it might have been true as a descriptive matter that participating in public life exposed one to the possibility of being publicized against one's will.<sup>232</sup> A more substantive, normative rationale for this position was contained in the "matters of public interest" or "newsworthiness" privilege. The

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226. See *Sweenek v. Pathe News, Inc.*, 16 F. Supp. 746 (E.D.N.Y. 1936) (woman participating in an exercise class); *Middleton v. News Syndicate Co.*, 295 N.Y.S. 120 (Sup. Ct. 1937) (woman portrayed as a waitress, even though she was a model); see also WALTER A. STEIGLEMAN, *THE NEWSPAPERMAN AND THE LAW* 228 (1950) ("A hermit is entitled to his seclusion, but even he has no legal complaint if people think his peculiar way of life is of sufficient interest for a feature article.").

227. *Sweenek*, 16 F. Supp. at 747-48.

228. *Id.*

229. 79 F. Supp. 957, 957-58, 963 (D. Minn. 1948).

230. *Id.* at 961 (internal quotation marks omitted).

231. *Martin v. New Metro. Fiction, Inc.*, 248 N.Y.S. 359, 362 (Sup. Ct. 1931).

232. See *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 79-80 (Ga. 1905).

newsworthiness privilege, which was developed during this period, applied an emerging civil libertarian free speech jurisprudence to the tort privacy context. Under this view, a right to privacy that imposed liability for the publication of truthful matters of public interest would create unreasonable and potentially unconstitutional restrictions on the press. The individual's interest in privacy must yield to the greater good served by the circulation of the "news."

### 3. *Newsworthiness*

The newsworthiness privilege immunized media defendants from invasion of privacy claims if a court found the publicized material to be "newsworthy" or a "matter of public interest."<sup>233</sup> We have seen the origins of the "public interest" exemption in the Warren and Brandeis article and in the New York privacy statute of 1903, which limited liability to "trade"—defined as "non-newsworthy"—publications. Rejecting the relatively narrow definition of the news held by Warren and Brandeis and other privacy advocates of their time, courts now defined newsworthy material and matters of public interest expansively. Articles and photos that were titillating, bizarre, provocative, or simply amusing, and that were not wholly fictionalized, were considered newsworthy as long as they did not completely offend public sensibilities.<sup>234</sup> As a federal district court observed in a 1936 privacy case, news includes all events and occurrences which "have that indefinable quality of interest, which attracts public attention."<sup>235</sup> The fact that material appeared in a publication that had a paying audience—any publication, from *The New Yorker* to *True Detective Stories*—appeared to satisfy courts that the matter was one of legitimate public interest and that it was not offensive.

Newsworthy publications included items that were "neither strictly news items nor strictly fictional in character."<sup>236</sup> "Such subjects as cartoons, Believe-it-or-Not Ripley, gossip and social columns, are . . . not likely to be actionable if the facts stated are true and if the comment is fair."<sup>237</sup> Newsworthy material was not limited to newspa-

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233. See Nizer, *supra* note 218, at 540–47.

234. A publication containing false or exaggerated elements was only considered to be non-newsworthy when it rose to the level of complete fictionalization. See *D'Altomonte v. N.Y. Herald Co.*, 139 N.Y.S. 200, 202–03 (App. Div. 1913).

235. *Sweenek v. Pathe News, Inc.*, 16 F. Supp. 746, 747 (E.D.N.Y. 1936) (quoting *Associated Press v. Int'l News Serv.*, 245 F. 244, 248 (2d Cir. 1917) (internal quotation marks omitted)).

236. *Lahiri v. Daily Mirror, Inc.*, 295 N.Y.S. 382, 389 (Sup. Ct. 1937).

237. *Molony v. Boy Comics Publishers, Inc.*, 98 N.Y.S.2d 119, 123 (App. Div. 1950).

pers—it could also appear in newsreels, magazines, and books<sup>238</sup>—and it encompassed more than just current events. In a case from 1949, a former professional boxer who went under the name Canvasback Cohen had retired from the ring, but ten years later, Groucho Marx mentioned his name in a radio broadcast, and Cohen sued for invasion of privacy.<sup>239</sup> The court held that no matter how much he wished to retreat from the public eye, he could not “draw himself like a snail into his shell” and retreat from public view “at his will and whim” because he still piqued the public’s interest.<sup>240</sup>

What is striking when compared to the earlier period is the deference to the press on the newsworthiness issue. Under the earlier model, the scope of newsworthiness was determined by the extent of the individual’s waiver of privacy—information that an individual did not waive was generally not considered to be newsworthy. By the 1940s, the extent of one’s waiver of privacy was determined by the scope of newsworthiness. One surrendered her right to privacy to whatever extent publishers felt was necessary to report the news. Underlying the expansive newsworthiness concept were new visions of the relationship between the press and its audiences, the meaning of “freedom of the press,” the social value of the news media, and why the imperatives of participatory democracy demanded an expansive definition of what was fit to print.

#### a. The Public’s Right to Know

In the earlier period, courts and commentators had been conscious of the potential conflict between the right of privacy and the freedoms of speech and press. Yet under the dominant approach to freedom of speech at that time, courts upheld restrictions on speech and publishing if the material was seen as having a “bad tendency”—a propensity to undermine public order and morals. Defamations and invasions of privacy were described as immoral and thus could be repressed without constitutional difficulty. In the words of the Supreme Court of the District of Columbia, “[T]he freedom of the press, guaranteed by [the] Constitution, is not a freedom to violate the rights of others,” and it did not warrant an invasion of privacy any more than it permitted defaming a person.<sup>241</sup>

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238. See *Humiston v. Universal Film Mfg. Co.*, 178 N.Y.S. 752, 755 (App. Div. 1919); *Kline v. Robert M. McBride & Co.*, 11 N.Y.S.2d 674, 682–83 (Sup. Ct. 1939).

239. *Cohen v. Marx*, 211 P.2d 320, 321 (Cal. Dist. Ct. App. 1949).

240. *Id.* at 321.

241. BENT, *supra* note 28, at 70.

The "bad tendency" doctrine legitimized what would now be considered unconstitutional content-based restrictions on publishing. In the early twentieth century, over a dozen states had laws that criminally punished the printing, publishing, and selling of publications containing "criminal news, police reports, or accounts of criminal deeds, or pictures, or stories or deeds of bloodshed, lust, or crime."<sup>242</sup> Various forms of literary censorship existed, and social reform groups advocated further restrictions, including the creation of a national board of censorship for magazines.<sup>243</sup> There were campaigns in several states calling for more stringent defamation laws.<sup>244</sup> Both to stay clear of existing laws and to stave off the passage of more severe measures, publishers exercised substantial self-censorship.<sup>245</sup>

It was not until the 1930s that the Supreme Court effectively abolished the bad tendency doctrine and began to develop what has remained the modern civil libertarian approach to freedom of expression.<sup>246</sup> In *Near v. Minnesota*, from 1931, the Court struck down as unconstitutional a Minnesota law enjoining "malicious, scandalous and defamatory" publications.<sup>247</sup> In *Near* and subsequent decisions in the 1930s, the Court indicated that it would view restrictions on publishing with heightened scrutiny because of the significance of free speech and a free press to the democratic process. The public needed a "vigilant and courageous press" to expose the abuses of corrupt governments and "unfaithful officials."<sup>248</sup> Because free expression was essential to participatory democracy, freedom of speech occupied a "preferred position" in the scheme of constitutional liberties, and state actions restricting speech could not stand unless justi-

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242. *Winters v. New York*, 333 U.S. 507, 520-23 & n.2 (1948).

243. PAUL S. BOYER, *PURITY IN PRINT: BOOK CENSORSHIP IN AMERICA FROM THE GILDED AGE TO THE COMPUTER AGE* 160-61 (2d ed. 2002).

244. NORMAN L. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* 214 (1986).

245. See ROSENBERG, *supra* note 244, at 225-26.

246. This was presaged by earlier state and federal court decisions involving alleged libels and violations of espionage and sedition laws, which had offered a more capacious view of freedom of the press. See, e.g., *Coleman v. MacLennan*, 98 P. 281, 289 (Kan. 1908) (libel); *Star Co. v. Brush*, 170 N.Y.S. 987, 992 (Sup. Ct. 1918) (striking down a local law that forbade the selling of papers that had criticized American involvement in the war and stating that if the law were upheld, "[o]ur greatest newspapers and other organs of information and discussion would be at the mercy of little groups of local officials here and there"); *Dearborn Publ'g Co. v. Fitzgerald*, 271 F. 479, 485-86 (N.D. Ohio 1921) (enjoining the publication of "obscene or scandalous" newspapers would be an assault on freedom of speech).

247. 283 U.S. 697, 700, 722-23 (1931).

248. *Id.* at 719-20; see also *Bridges v. California*, 314 U.S. 252, 269 (1941); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243 (1936).

fied by a compelling government interest beyond mere disagreement with the views espoused.<sup>249</sup>

Freedom of the press meant not only liberty to publish, but also the right of the public to have access to information about public affairs. In *Near*, the Court noted the importance of the press, even scandalous newspapers, as a means of generating public discourse around politics and civic issues.<sup>250</sup> In *Grosjean v. American Press Co.*, Justice Sutherland observed the value of a free press in disseminating news and enabling the public to “unite[ ] for [its] common good” as “members of an organized society.”<sup>251</sup> In *Thornhill v. Alabama*, from 1940, the Court alluded to a First Amendment right of the public to acquire and discuss “matters of public concern”—“information and education with respect to the significant issues of the time.”<sup>252</sup>

Although “matters of public concern” in *Thornhill* referred to politics and public affairs, the Court later held that the First Amendment also protects material published purely for entertainment. In *Winters v. New York*, in 1948, a case involving a “true crime” magazine, the Court implied that such publications were protected by freedom of the press. Given the state of popular journalism, with its focus on gossip and human interest, “[t]he line between the informing and the entertaining” was “elusive,” the majority opinion noted.<sup>253</sup> “What is one man’s amusement, teaches another’s doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.”<sup>254</sup> As the Court similarly noted in 1946, in *Hannegan v. Esquire, Inc.*:

Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, . . . varies . . . from one generation to another. . . . [A] requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system.<sup>255</sup>

The American way was to allow the public to “pick and choose” which ideas to believe, which values to embrace, which culture to consume.

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249. On the “preferred position” theory on the Court in this era, see FELDMAN, *supra* note 126, at 383–92.

250. 283 U.S. 697, 716–20 (1931).

251. 297 U.S. 233, 243 (1936).

252. 310 U.S. 88, 97, 102 (1940).

253. *Winters v. New York*, 333 U.S. 507, 510 (1948).

254. *Id.*

255. 327 U.S. 146, 157–58 (1946) (footnote omitted).



Material that seemed to one person “to be trash may have for others fleeting or even enduring values.”<sup>256</sup>

The newsworthiness concept embodied these antipaternalism, anti-censorship principles.<sup>257</sup> Beginning in the 1930s, courts framed the newsworthiness privilege in First Amendment terms as a safeguard of freedom of the press and the right of the public to access the news, broadly defined. A right of privacy that “cover[ed] news items and articles of general public interest, educational and informative in character,” implicated the rights of a “free press,” a New York trial court noted in the 1937 case *Lahiri v. Daily Mirror, Inc.*<sup>258</sup>

[I]n the case of a person who commits some act of great notoriety, or who, whether willingly or not, becomes an actor in an occurrence of public or general interest, the point is often reached where the freedom of the press and the right of the public to obtain the information becomes dominant over the individual’s desire for privacy.<sup>259</sup>

#### b. The Press Represents the Public’s Interest

The newsworthiness privilege operated on an assumption about the relationship between the press and its audiences—that publishers served the “public’s interest.” The belief that the press represented the “public,” rather than the interests of officials or elites, was a reflection, in part, of the class-driven conflicts over popular media at the time.<sup>260</sup> The 1930s saw campaigns for literary and press censorship led by elite social reform groups; there was also widespread popular resistance to these efforts.<sup>261</sup> Especially in light of book burnings and censorship of the press in fascist Europe, an unfettered right to see and read was celebrated as the American way, protected by the Constitution.<sup>262</sup> The broad newsworthiness concept reflected these move-

256. *Id.* at 158.

257. On the “antipaternalism principle,” see Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579 (2004); Daniel Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 557–58 (1991); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 212–13 (1983).

258. 295 N.Y.S. 382, 388 (Sup. Ct. 1937); see also *People v. Robert R. McBride & Co.*, 288 N.Y.S. 501, 509 (Magis. Ct. 1936) (“To give to section 50 [of the N.Y. privacy statute] the construction contended for by the complainant would necessarily impute to the Legislature an intent in its enactment to restrain or abridge the liberty of the press.”); Nizer, *supra* note 218, at 540.

259. *Martin v. Dorton*, 50 So. 2d 391, 393 (Miss. 1951); see also *Molony v. Boy Comics*, 98 N.Y.S.2d 119, 122–23 (Sup. Ct. 1950).

260. See SCHUDSON, *supra* note 30; TEEL, *supra* note 39, at 7.

261. See BOYER, *supra* note 243, at 211, 254–69.

262. See Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 77 (2000).

ments for free expression and the growing public sentiment that content-based “morals regulations” on the media did not express the values and interests of the mass populace and were thus undemocratic.<sup>263</sup>

Courts noted that editors and publishers, whose concerns with profit required them to keep abreast of popular preferences, were better suited than judges and legislatures to assess the public’s genuine interests and informational needs. A federal district court in 1948 observed that given the zest with which gossip publications were consumed, it should be assumed that publishers’ focus on private lives “merely cater[ed] to the present mores of the people.”<sup>264</sup> Since the time of the Warren and Brandeis article “we have gone much further . . . in attaching importance in the news to trivial things and sheer gossip regarding the intimate details of the lives of important and near-important people.”<sup>265</sup> Even though judges may have found some of the material to be offensive, it was not their place to impair the public’s reading habits or to pass judgment on its tastes. “Legal actions for invasion of the right of privacy must not be a vehicle for the establishment of a judicial censorship of the press.”<sup>266</sup>

c. The Public’s Need to Know

In reality, courts did judge the content of popular media in ways that were often favorable. In a 1940 privacy case, the Massachusetts Supreme Court wrote that most of what appeared in the press was benign or, at worst, “silly.”<sup>267</sup> As the *Sidis* court explained it, gossip and human interest journalism had a legitimate purpose; it addressed the public’s rightful interest in “the misfortunes and frailties of neighbors and ‘public figures.’”<sup>268</sup>

In the interwar period critics and academics began to discuss and theorize the social functions of the popular media, and the newsworthiness concept bore the influence of this dialogue. Public access to a wide range of information through the mass media was being described as a prerequisite for democratic citizenship,<sup>269</sup> and mass communications, including popular news and entertainment journalism, were said to be crucial to the processes of acculturation

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263. See BOYER, *supra* note 243.

264. Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957, 962 (D. Minn. 1948).

265. *Id.*

266. See Aquino v. Bulletin Co., 154 A.2d 422, 425 (Pa. Super. Ct. 1959).

267. Themo v. New Eng. Newspaper Publ’g Co., 27 N.E.2d 753, 754 (Mass. 1940).

268. *Sidis* v. F-R Publ’g Corp., 113 F.2d 806, 809 (2d Cir. 1940).

269. See COMM’N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 14 (1947).

and socialization.<sup>270</sup> By providing a diverse public with shared interests and knowledge, by reinforcing common values, and by sparking discussion and debate over social practices and issues, popular journalism could serve as the modern equivalent of back-fence gossip and as the “printed folklore of the factory age.”<sup>271</sup>

“As I looked at this afternoon’s paper it struck me as being remarkably nose-y,” noted the author of a 1934 article titled *A Use for Human Interest Stories*.<sup>272</sup> The details about average people that appeared in its pages were “just out of ordinary . . . curiosity. Small-town stuff. Neighborhood gossip.”<sup>273</sup> If one lived in a small town, “[t]he stuff the newspaper prints would have been superficial to you, for you would have known so much more about [the subjects] that was so much more intimate.”<sup>274</sup> “The human interest article . . . gives something of that intimacy. . . . It satisfies our insatiable desire to peek and pry, and to be peeked and pried at.”<sup>275</sup> In 1940, communications theorist Helen MacGill Hughes observed that newspaper stories about personalities and private lives permitted the “sort of intercourse that people formerly carried on at the crossroad stores or back fences” and created the “conditions of close communication whose absence denies the city the social cohesion that the village possesses.”<sup>276</sup> Language in the *Restatement (First) of Torts*, published in 1939, also suggested the sociological similarities between human interest stories and small-town oral gossip. As the *Restatement* observed, referring to the press attention given to those bound up in newsworthy events,

Community custom achieves the same result with reference to one unjustly charged with crime or the subject of a striking catastrophe. Both groups of persons are the objects of legitimate public interest during a period of time after their conduct or misfortune has brought them to the public attention; until they have reverted to the lawful and unexciting life led by the great bulk of the community,

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270. See JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 98 (1927); Bernard Berelson, *What “Missing the Newspaper” Means*, in *MASS COMMUNICATIONS AND AMERICAN SOCIAL THOUGHT* 254 (John Durham Peters & Peter Simonson eds., 2004); Robert E. Park, *News as a Form of Knowledge: A Chapter in the Sociology of Knowledge*, 45 *AM. J. SOC.* 669, 679 (1940).

271. HUGHES, *supra* note 32, at 103 (quoting Silas Bent); see also Zimmerman, *supra* note 4, at 333 (“The press, therefore, when it provides information about the private lives of both famous and ordinary people, could be viewed merely as performing a traditional function that no longer can be accomplished by person-to-person gossip alone.”).

272. William G. Mather, Jr., *A Use for Human Interest Stories*, 238 *N. AM. REV.* 543, 543 (1934).

273. *Id.*

274. *Id.* at 544.

275. *Id.*

276. Helen MacGill Hughes, *Human Interest Stories and Democracy*, *PUB. OPINION Q.*, Apr. 1937, at 73, 78.

they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims.<sup>277</sup>

“Regrettably or not, the misfortunes and frailties of neighbors and ‘public figures’ are subjects of considerable interest” to the public, wrote the *Sidis* court, “[a]nd when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.”<sup>278</sup>

#### 4. *The Harms of Exposure*

The final assumption underlying the modern position on privacy had to do with the perceived harms of exposure. As the doctrine had evolved by 1950, to win a suit for invasion of privacy by public disclosure of private material, the disclosure must have been non-newsworthy and offensive to a reasonable person.<sup>279</sup> As the *Restatement* summarized, “It is only when the defendant should know that the plaintiff would be justified in feeling seriously hurt by the conduct that a cause of action exists.”<sup>280</sup> Sometimes this was phrased in terms of offense not to the subject, but to the audience; disclosures, as the *Sidis* court put it, must not be so intimate and unwarranted “as to outrage the community’s notions of decency.”<sup>281</sup>

In contrast to the earlier perspective, it was now often assumed that the reasonable person would not be harmed by most sorts of media exposure. The right to privacy did not protect the hypersensitive individual, and one who was offended by press commentary on one’s “dress, speech, habits, and the ordinary aspects of personality” was hypersensitive under modern standards.<sup>282</sup> According to the *Restatement*, “[T]here is no invasion of a right of privacy in the description of the ordinary goings and comings of a person or of weddings, even though intended to be entirely private . . . .”<sup>283</sup> Samuel Warren, with

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277. RESTATEMENT (FIRST) OF TORTS § 867 cmt. c (1939).

278. *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940).

279. RESTATEMENT (FIRST) OF TORTS § 867 cmt. c (1939) (non-liability for publicity of public figures and newsworthy events such as a “striking catastrophe”); see also *id.* § 867 cmt. d (“[L]iability exists only if the defendant’s conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities.”).

280. *Id.* § 867 cmt. d.

281. *Sidis*, 113 F.2d at 809.

282. *Id.*

283. RESTATEMENT (FIRST) OF TORTS § 867 cmt. d (1939).

his outrage over the publicity of his niece's wedding, was no longer the reasonable man.<sup>284</sup>

This position rested, in part, on the popular belief at the time that modern life—"[t]he telephone . . . ; the radio . . . ; the current flood of questionnaires; the spread and mushroom growth of keyhole journalism; the prying eyes of the candid camera; the newsreel; the traffic in mailing lists"—had desensitized the public to invasions of privacy, and that much of the populace had become not only voyeuristic but exhibitionist, both eager to pry into strangers' lives and to show themselves off to others.<sup>285</sup> When the 1940 census added questions about income, educational level, and marital status, there were discussions that this constituted an invasion of privacy. First Lady Eleanor Roosevelt defended the changes, noting that women no longer minded discussing "their age, income and whether they have been divorced."<sup>286</sup> Commentators noted "the public eagerness to express opinions and pose for pictures for Inquiring Reporters who roam the large cities" and "the willingness of people to . . . surrender . . . intimate secrets to radio personalities . . . who exploit them on the air."<sup>287</sup> A writer in *The Atlantic* noted:

The pendulum has swung far since the hyper-reticent days of our grandmothers. . . . [T]he majority [has] lost all desire for privacy, either for themselves or for anyone else. They step eagerly into the range of every newspaper and movie camera, and send in their names by the thousand to have them announced over the radio.<sup>288</sup>

Many Americans "crave to be lifted out of the morass of anonymity."<sup>289</sup> To them, "[a]ny publicity, even though unfavorable, is better than none at all."<sup>290</sup>

It was against this backdrop that courts expressed suspicion of claims of emotional and dignitary harms from media exposure.<sup>291</sup> In a number of cases, courts concluded that because people had become used to exposing aspects of their private lives, and because they may

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284. As Prosser later wrote, "The ordinary reasonable man does not take offense at mention in a newspaper of the fact that he has returned from a visit, or gone camping in the woods, or that he has given a party at his house for his friends . . . ." Prosser, *supra* note 8, at 397.

285. See Berger, *supra* note 13, at 16.

286. *First Lady Calls Census All Right*, N.Y. TIMES, Mar. 19, 1940, at 14.

287. Berger, *supra* note 13, at 18.

288. Dawson, *supra* note 155, at 387.

289. Dawson, *supra* note 189, at 404.

290. George Ragland, Jr., *The Right of Privacy*, 17 KY. L.J. 85, 87 (1929).

291. Yet courts were, in other contexts, becoming more sympathetic to claims of mental distress without accompanying physical injury. See G. EDWARD WHITE, *TORT LAW IN AMERICA* 103 (Expanded ed. 2003) (noting that claims for emotional distress began to seem less speculative in the 1920s and 1930s as psychology came to be regarded as a science and emotional distress regarded as a legitimate illness).

have even wanted to be publicized, they were unlikely to be seriously harmed by most sorts of media publicity. Only highly unflattering publicity of extremely intimate matters would constitute an invasion of privacy. If the material revealed was not overtly uncomplimentary, no harm had occurred.<sup>292</sup> In Pittsburgh, a woman asked for \$10,000 for "humiliation" when her photo was used in a display of beautiful women in a pharmacy window that she did not approve.<sup>293</sup> The court awarded one dollar on the grounds that there was no harm because the display was flattering.<sup>294</sup> A 1947 case, *Cason v. Baskin*, involved a privacy claim brought by a woman who was described as a colorful but eccentric spinster in a novel written by a famous author.<sup>295</sup> The Supreme Court of Florida upheld Cason's claim for invasion of privacy but directed that she be awarded no damages because the character sketch portrayed the plaintiff as "a fine and attractive" individual.<sup>296</sup>

One enduring legacy of the nineteenth century was privacy's gendered dimension and the notion that respectable women, naturally modest and averse to the public gaze, were more emotionally sensitive and vulnerable to the harms of unwanted public exposure, particularly when it implicated sexuality or the body.<sup>297</sup> Privacy suits involving women plaintiffs accounted for a significant number of successful cases against media defendants.<sup>298</sup> In *Melvin v. Reid*, from 1931, the plaintiff was a former prostitute who had been tried for murder and acquitted, but who had reformed herself, married, and achieved a place in respectable society.<sup>299</sup> A movie was produced based on the

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292. See, e.g., *Samuel v. Curtis Publ'g Co.*, 122 F. Supp. 327, 329 (N.D. Cal. 1954) (concluding that a picture of a man talking to a woman on the edge of a bridge in an attempt to dissuade her from committing suicide "would [not] cause the publisher of the picture to have reason to believe that the picture would offend the sensibilities of a normal person"); see also *Gill v. Hearst Publ'g Co.*, 253 P.2d 441, 445 (Cal. 1953) ("Nor does there appear to be anything 'uncomplimentary' or discreditable in the photograph itself, so that its publication might be objectionable as going 'beyond the limits of decency' and reasonably indicate defendants' conduct to be such that they 'should have realized [that] it would be offensive to persons of ordinary sensibilities.'" (quoting RESTATEMENT (FIRST) OF TORTS § 867 cmt. d (1939))).

293. *Woman Wins a \$1 Verdict*, N.Y. TIMES, Jan. 30, 1942, at 21.

294. *Id.*

295. *Cason v. Baskin*, 30 So. 2d 635 (Fla. 1947).

296. *Id.* at 645. For an interesting account of this case, see PATRICIA NASSIF ACTON, *INVASION OF PRIVACY: THE CROSS CREEK TRIAL OF MARJORIE KINNAN RAWLINGS* (1988).

297. See generally Anita Allen & Erin Mack, *How Privacy Got Its Gender*, 10 N. ILL. U. L. REV. 441 (1990).

298. See, e.g., *Peay v. Curtis Publ'g Co.*, 78 F. Supp. 305 (D.D.C. 1948); *Barber v. Time, Inc.*, 159 S.W.2d 291 (Mo. 1942); *Sutton v. Hearst Corp.*, 98 N.Y.S.2d 233 (App. Div. 1950); *Blumenthal v. Picture Classics, Inc.*, 257 N.Y.S. 800 (App. Div. 1932); *Semler v. Ultem Publ'ns, Inc.*, 9 N.Y.S.2d 319 (City Ct. 1938).

299. 297 P. 91, 91 (Cal. Dist. Ct. App. 1931).

true story of her past life, using her true maiden name.<sup>300</sup> She sued the producer and recovered damages for invasion of privacy on the theory that publicity of her disreputable sexual past inflicted a deep affront to her dignity and reputation.<sup>301</sup> In the 1942 case of *Barber v. Time, Inc.*, the publication in *Time* magazine of an article about a woman's rare ailment that caused her to lose weight while eating insatiably, together with a picture of her in bed wearing a hospital gown, was held not to be newsworthy.<sup>302</sup> Similarly, courts were more likely to find publicity offensive or not newsworthy when it involved children, who were presumed incapable of assuming the risk of public exposure and more likely to be harmed by it.<sup>303</sup> But in most cases, the assumption was that very few people truly resented publicity and that "[o]nly a shy minority is really hurt by the spotlight."<sup>304</sup> Having one's photo in the paper was not in itself offensive because "[t]he average person likes to see his picture in a newspaper upon any pretext."<sup>305</sup> As one popular writer had put it, in a world where publicity was highly valued and highly paid, most people are "glad to live in a glass house" and to wash their dirty linen in public.<sup>306</sup>

### C. *Privacy Beyond the Law*

The foundations of the modern tort law of privacy were developed primarily between the 1920s and the 1950s, when new technologies for acquiring and disseminating images and information, the fascination with celebrity and self-exposure, the proliferation of human interest and personality journalism, and the theoretical and constitutional justifications for its circulation produced a set of doctrinal conventions and fictions that protected what was described as the "right of the public and the press to discuss personalities."<sup>307</sup> This history explains, in part, why successful privacy suits against the media are relatively rare in the United States as compared to European countries.<sup>308</sup> Privacy law did not develop strongly in America because its evolution coincided with the emergence of a liberal free press doctrine and a culture of exposure.

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300. *Id.*

301. *Id.*

302. 159 S.W.2d 291, 293 (Mo. 1942).

303. *Leverson v. Curtis Publ'g Co.*, 192 F.2d 974 (3d Cir. 1951); *Metzger v. Dell Publ'g Co.*, 136 N.Y.S.2d 888 (Sup. Ct. 1955).

304. Dawson, *supra* note 189, at 404.

305. Larremore, *supra* note 102, at 702.

306. Dawson, *supra* note 189, at 398.

307. *See Themo v. New Eng. Newspaper Publ'g Co.*, 27 N.E.2d 753 (Mass. 1940).

308. *See supra* note 15 and accompanying text.

This modern position on privacy was attacked by legal commentators for its apparent disregard of the value of privacy.<sup>309</sup> One critique was the failure to take into account the difference between appearing “in public,” in the sense of being outside one’s home, and being displayed before a media audience.<sup>310</sup> Deference to the press on the newsworthiness question was also criticized. Editors were hardly in touch with the public interest, it was said, and the purpose of gossip and human interest journalism was merely to sell papers by pandering to the public’s worst tendencies and curiosities.<sup>311</sup> Other critics noted the limitations of the privacy tort as a means of redressing the harms caused by media exposure of private life. Victims of truly embarrassing publicity were unlikely to go to court because bringing suit would attract further attention to the matter.<sup>312</sup> The more serious the injury, the less likely that the victim would care to revisit it by taking legal action.

Yet it would be wrong to describe the emerging legal position as an abandonment of privacy. The doctrine was fashioned against a backdrop of significant extra-legal safeguards against excessive and intrusive media exposures—social norms, institutional checks within journalism and the publishing industry, and the inherent limitations of existing technologies. As the courts may have recognized, privacy could exist in practice beyond the relatively narrow protections offered by the law.

The interwar period saw the professionalization of journalism, the eradication of many of the excesses of yellow journalism, and the formulation of industry-wide codes of ethics.<sup>313</sup> The American Society of Newspaper Editors’ code, created in 1923, required that “[a] newspaper should not invade private rights or feelings without sure warrant of public right as distinguished from public curiosity.”<sup>314</sup> Much anecdotal evidence indicates that this rule was not always followed.<sup>315</sup> Many news publications did, however, adopt editing and reporting practices that restrained more extreme intrusions into private affairs.

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309. See, e.g., Baldwin, *supra* note 187; Berger, *supra* note 13; Dawson, *supra* note 189.

310. See FRANK THAYER, *LEGAL CONTROL OF THE PRESS* 501 (1944) (opining that, were a photo taken of a movie star sunbathing on her deck and published in a newspaper, there would be a violation of her privacy because “by taking the sunbath in what she considered private quarters, she did not consent to having her photograph spread across the nation”).

311. See generally Dawson, *supra* note 155.

312. Dawson, *supra* note 189, at 404.

313. See *ENCYCLOPEDIA OF AMERICAN JOURNALISM* 21 (Stephen L. Vaughn ed., 2008); John H. Summers, *What Happened to Sex Scandals? Politics and Peccadilloes, Jefferson to Kennedy*, 87 J. AM. HIST. 825, 842 (2000).

314. *Fame and Privacy*, *NATION*, Aug. 20, 1930, at 195 (internal quotation marks omitted).

315. See generally BENT, *supra* note 28.



Some newspapers had “office rule[s] not to print details of local divorce suits, statutory assaults, and other local stories in court and out involving the sex question,”<sup>316</sup> and a policy of printing news of divorces and crimes but not the names of the individuals involved.<sup>317</sup> Most had a practice of suppressing the names and the photographs of children connected with crime or criminals, to avoid “the child . . . be[ing] singled out for possible scorn and ridicule.”<sup>318</sup> As one managing editor wrote in 1940, “There is one thing that all editors do almost without exception: they protect the good name of virtuous women and of young boys of good family.”<sup>319</sup> Scenes of funerals and burials were taboo, and “four letter words related to sex and bodily functions [were] shunned.”<sup>320</sup> The romantic affairs and illnesses of politicians were often strictly concealed,<sup>321</sup> and the more risqué activities of movie stars were frequently suppressed.<sup>322</sup> Mainstream news outlets sought to distinguish themselves from the tabloids in their exercise of restraint, and the *New York Times* prided itself on being “decently mum on many a scandal that the hard-eyed New York *Daily News* delights to mock and maul.”<sup>323</sup>

These practices were an attempt, in some sense, to track social norms. Despite expansive public curiosities, there were still topics, particularly in more conservative parts of the country, that were seen as too intimate or personal for public display and discussion. Gerald Johnson, a commentator on the press and a columnist for the *Baltimore Sun*, noted the presence of distinctive “communal mores” in certain areas—strict taboos on the discussion of sexual matters, for example, or conventions regarding the portrayal of women.<sup>324</sup> Despite the growth of national and regional newspaper chains, in many areas editors were still members of the local community and were

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316. KILLING THE MESSENGER: 100 YEARS OF MEDIA CRITICISM 19 (Tom Goldstein ed., rev. ed. 2007) (quoting the 1911 editorial of journalist William Allen White).

317. *Id.*

318. STEIGLEMAN, *supra* note 226, at 231.

319. NEIL MACNEIL, WITHOUT FEAR OR FAVOR 349 (1940); *see also* THE NEWSPAPER AND SOCIETY 132 (George L. Bird & Frederic E. Merwin eds., 1942) (“Practically all newspapers enjoin greater care in dealing with the reputation of women . . .”).

320. CURTIS D. MACDOUGALL, THE PRESS AND ITS PROBLEMS 118 (1964). On one paper’s taboo list were the words *nude*, *naked*, *rape*, *gossip*, and *scandal*. *See* Max Hall, *Can a Yellow Rag Change Its Color?*, in REPORTING THE NEWS 166 (1965).

321. *See generally* Summers, *supra* note 313. The most famous case is President Roosevelt’s polio. *See* LANE, *supra* note 26, at 10.

322. This was often done via agreement with the Hollywood studios. *See generally* BARBAS, *supra* note 153.

323. *Not So Private Lives*, TIME, Oct. 18, 1948, at 55.

324. *See* Johnson, *supra* note 158, at 70–71.

closely accountable to their readers.<sup>325</sup> As Johnson observed, in many regions, “the newspaper must conform” with social norms “on pain of losing circulation and with it the advertising value by which it lives.”<sup>326</sup> William Allen White, editor of the *Emporia Gazette*, wrote that the paper lost more money than it made when it published the “sickening details” of a notorious murder trial.<sup>327</sup>

The strongest check against invasive media exposures of private life may have been the inherent limitations of existing technologies. There was limited space in a newspaper or magazine. It required human effort to take pictures. Even the most persistent paparazzi could not capture what a video camera, in later years, could record in an instant. The reach of even the most widely circulated newspapers and magazines was miniscule compared to what would be achieved by television and the Internet. Compared to what lay ahead, the technology of the pre-World War II era did not allow the law’s position on privacy to become a license for total exposure.

#### IV. PRIVACY LAW’S SECOND MODERN ERA, 1950–1970

By 1960, a right to privacy existed in the “overwhelming majority of the American courts.”<sup>328</sup> In most states, it constituted a tort to publish material concerning one’s private or personal affairs if the publication was highly offensive to a reasonable person and the material was not a matter of public concern, or “newsworthy.”<sup>329</sup> As we have seen, the courts’ tendency to defer to the press on the newsworthiness question led to a balance between privacy and the “public’s right to know” that was heavily weighted toward the latter. The balance tipped even more sharply in that direction in the two decades after World War II.

In the postwar era, the courts continued to apply the law in a way that often precluded recovery against media defendants. At the same time, transformations in the social, cultural, and technological environment increased the likelihood and the potential harms of exposure in the mass media. Televisions became a presence in most American homes in the 1950s, and postwar affluence and increased leisure time vastly increased the audience for news and entertainment media.<sup>330</sup> Media coverage of World War II introduced a new frankness and real-

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325. STEIGLEMAN, *supra* note 226, at 231.

326. Johnson, *supra* note 158, at 70.

327. KILLING THE MESSENGER, *supra* note 316, at 19.

328. See Prosser, *supra* note 8, at 386–87.

329. See *id.* at 396, 412.

330. See VANCE PACKARD, *THE NAKED SOCIETY* 23 (1964).

ism into journalism and popular culture, and investigative reporting became a prominent genre. The postwar era saw the popularity of new scandal and gossip publications such as *Confidential* and the *National Enquirer*. Their sensational coverage was aided by new technologies of surveillance—wiretaps and hidden cameras—that also owed their origin to the war experience. Rather than increase legal protections for privacy, these developments, as in the earlier period, diminished them; the public had become desensitized to exposure, it was said, or somehow assumed the increased risks of media publicity. As the focus of the public's privacy anxieties in the Cold War era became the government, rather than the press, and as the Supreme Court expanded the scope of constitutionally protected speech, the possibility of unwanted and humiliating mass exposure came to be regarded as a necessary casualty of a free marketplace of ideas.

### A. *The New Old Doctrine*

#### 1. *Privacy and Celebrity*

In the postwar era, furthered by the development and cultural permeation of the medium of television, the public's fascination with celebrity deepened and suffused all areas of social life. To be a celebrity, as cultural critic Daniel Boorstin noted in 1962, was to be known for one's personality and private affairs.<sup>331</sup> "When we talk or read or write about celebrities, our emphasis [is] on their marital relations and sexual habits, on their tastes in smoking, drinking, dress, sports cars, and interior decoration . . . ."<sup>332</sup> Therefore, courts reasoned, the celebrity assumed the risk of having much of her private life exposed to the public when she took on a career that would lead to fame.<sup>333</sup> While the recognition and development of a right of publicity in the 1950s permitted recovery of the economic value of one's personality when exploited for commercial purposes,<sup>334</sup> in the noncommercial or "news" context, courts construed the celebrity's waiver of privacy to be expansive. Some courts would limit it at intimate romantic affairs

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331. See BOORSTIN, *supra* note 144, at 65; see also *The Mass Media and JFK*, 37 CLEARING HOUSE 443, 443 (1963) ("[T]he important names in television [are] people who remain basically themselves when on camera.").

332. BOORSTIN, *supra* note 144, at 65.

333. See PROSSER, *supra* note 8, at 411 ("Three reasons are given, more or less indiscriminately, in the decisions: that they have sought publicity and consented to it, . . . that their personalities and their affairs already have become public, . . . and that the press has a privilege, guaranteed by the Constitution, to inform the public about those who have become legitimate matters of public interest.").

334. For the origins of the right of publicity, see Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203, 203-06 (1954).

or highly personal family activities.<sup>335</sup> Others went as far as to suggest that the waiver was absolute. As a 1953 treatise explained, "As far as public performers are concerned, the right of privacy is nonexistent or has long since been waived. . . . Public performers who are currently in the public eye are in no position to claim injury to their mental interests."<sup>336</sup> "So highly personal is the interest of the public in 'public figures' that I doubt it is actionable to publish fair reports of incidents in a private life not directly related to the qualities or achievements upon which the status of a public figure depends," noted a federal district court in *Hazlitt v. Fawcett Publications, Inc.*, which involved a story about a famous stunt driver.<sup>337</sup> In *Chaplin v. NBC*, from 1953, Charlie Chaplin sued NBC over news broadcasts that aired a telephone conversation between Chaplin and a radio commentator that had been obtained by wiretapping.<sup>338</sup> Chaplin was said to have waived his right of privacy over the phone conversation because he was "a prominent public figure whose activities are of general public interest."<sup>339</sup>

The continued growth of the psychological profession and the war-time popularization of psychological concepts in popular culture<sup>340</sup> fueled the notion that a public figure could not be really known or understood without a searching investigation of his psyche and private life.<sup>341</sup> As the vice president and general counsel of *Look* magazine put it, "The press . . . has not only the right, but the duty, to publish facts pertaining to public figures and, in so doing, to examine them to see what makes them 'tick,' how they stack up on analysis, and what they are . . . as persons."<sup>342</sup> Before World War II, the press had, to

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335. See Irwin O. Spiegel, *Public Celebrity v. Scandal Magazine—The Celebrity's Right to Privacy*, 30 S. CAL. L. REV. 280, 297, 299 (1957).

336. HARRY P. WARNER, *RADIO AND TELEVISION RIGHTS* 995–96 (1953); see also *Gill v. Hearst Publ'g Co.*, 253 P.2d 441, 447 (Cal. 1953) (Carter, J., dissenting) ("Obviously anything [a celebrity] may do or say has news or educational value."); Yankwich, *supra* note 183, at 519 ("It does not exist where a person has become prominent or distinguished. By such prominence he has dedicated his life to the public and thereby waived his right to privacy.").

337. *Hazlitt v. Fawcett Publ'ns, Inc.*, 116 F. Supp. 538, 544 (D. Conn. 1953).

338. *Chaplin v. NBC*, 15 F.R.D. 134, 136 (S.D.N.Y. 1953).

339. *Id.* at 138.

340. See generally ELLEN HERMAN, *THE ROMANCE OF AMERICAN PSYCHOLOGY: POLITICAL CULTURE IN THE AGE OF EXPERTS* (1995).

341. See JEFFREY OLEN, *ETHICS IN JOURNALISM* 62–64 (1988) (noting that some private affairs of politicians—sexual affairs, psychiatric problems, drinking problems, among others—may have bearing on public officials' public responsibilities and can be legitimate subjects of media coverage); see also *JOURNALISM ETHICS* 223 (Christopher Meyers ed., 2010) ("When private information is connected to the job performance of a current or potential public official, this information is certainly relevant and needed.").

342. *Sinatra Drops His Libel Suit for \$2,300,000*, L.A. TIMES, Dec. 17, 1957, at 4.

some extent, concealed the private affairs of public officials as part of an unwritten agreement in which officials granted reporters access in return for suppressing potential scandal.<sup>343</sup> Yet journalists were less likely to follow this agreement in the postwar era, when a new focus on investigative journalism encouraged deeper coverage of public officials' personal lives.<sup>344</sup> The law deferred to this reporting trend. In a representative case, *Kapellas v. Kofman*, the California Supreme Court held that a newspaper article that revealed the various arrests of the children of a candidate for office did not violate her or her children's right to privacy.<sup>345</sup> The court concluded, "[a]lthough the conduct of a candidate's children in many cases may not appear particularly relevant to his qualifications for office, normally the public should be permitted to determine the importance or relevance of the reported facts for itself."<sup>346</sup> One who is a public figure is "subjected to the most thorough scrutiny."<sup>347</sup>

## 2. *Privacy in Public*

In light of the growth of the paparazzi, live television coverage, and the increasing presence of cameras in public places,<sup>348</sup> courts maintained that both famous people and noncelebrities waived their right to privacy when they appeared in a public place. Rather than increase the need for legal protection against invasions of privacy, courts held that the risk of unwanted publicity posed by these technological developments was to be assumed by the public. In *Jacova v. Southern Radio & Television Co.*, a television company showed a newscast depicting a man who had been arrested at a cigar store as part of a police gambling raid.<sup>349</sup> The man, who had stopped at the store to buy a newspaper, was falsely accused of being a gangster, and the footage depicted him being shoved up against a wall by the police.<sup>350</sup> He alleged that he was deeply humiliated by this public display in a false

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343. See Summers, *supra* note 313, at 845–46.

344. See JAMES L. AUCOIN, *THE EVOLUTION OF AMERICAN INVESTIGATIVE JOURNALISM* 51 (2005) (tracing the resurgence of investigative journalism to the fallout between the press and the government in the mid-1950s). Before the 1950s, the mainstream news media did not take an aggressive stance against the government, Aucoin writes, but Senator Joseph McCarthy's intimidation of the press led to a more adversarial relationship and a call for "more in-depth" reporting on public affairs and public officials. *Id.*

345. 459 P.2d 912, 924 (Cal. 1969).

346. *Id.* at 923.

347. *Id.* at 922.

348. See PACKARD, *supra* note 330, at 29–43; WESTIN, *supra* note 16, at 70–73.

349. 83 So. 2d 34, 35–36 (Fla. 1955).

350. *Id.*

context.<sup>351</sup> The court held that the subject had waived his right to privacy because the actions took place in public.<sup>352</sup> In the 1954 case *Gill v. Hearst Publishing Co.*, the California Supreme Court rejected the claim of a couple who had been photographed in an affectionate pose at their place of business, a ice cream shop in the Farmers' Market in Los Angeles, by a news photographer.<sup>353</sup> They did not know that the photograph would appear in *Harper's Bazaar* magazine, where it was used to illustrate an article about "love at first sight."<sup>354</sup> The court held that the couple waived their right to privacy insofar as they had "voluntarily" taken the pose in public.<sup>355</sup> The image thus became a part of the "public domain . . . as to which they could not later rescind their waiver in an attempt to assert a right to privacy." "The photograph did not disclose anything which until then had been private," the court concluded, "but rather only extended knowledge of the particular incident to a somewhat larger public than had actually witnessed it at the time of occurrence."<sup>356</sup>

Consenting to public exposure in one context was, in other words, the same as consenting to exposure in almost any medium or context. Though the widow of a man who had been kicked to death by gangsters permitted representatives of the *Pittsburgh Post-Gazette* and the *Pittsburgh Press* to take pictures of the family, she did not authorize their use in the pulp magazine *Front Page Detective*.<sup>357</sup> A federal district court rejected her claim for invasion of privacy against *Front Page Detective*, holding that the family had "voluntarily attached themselves pictorially to this news item."<sup>358</sup> In 1949, the Marine Corps officer whose life story had been made into the famous Hollywood war film *Sands of Iwo Jima* lost his suit for invasion of privacy against the Republic Film Company.<sup>359</sup> The court held that he had waived his right to avoid having a film made about him when he

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351. *Id.* at 35.

352. *Id.* at 40. *Time* magazine, in 1954, asked, "Does a press photographer have the right to take a newsworthy picture even when the subject objects?" The answer in a lower Iowa court was that a "photographer is within his rights so long as he is in a public place. . . . [P]hotographers on public property may take pictures of anyone they want to, objection or no." *Freedom to Photograph*, *TIME*, Aug. 9, 1954, at 52, 52.

353. 253 P.2d 441, 442-45 (Cal. 1953).

354. *Id.* at 442.

355. *Id.* at 444.

356. *Id.* at 445. *But see* *Gill v. Curtis Publ'g Co.*, 239 P.2d. 630, 635 (Cal. 1952) (holding that the publication of the photograph in the context of an article that appeared to suggest that their love was based on "100% sex" was actionable).

357. *Jenkins v. Dell Publ'g Co.*, 143 F. Supp. 952, 954 (W.D. Pa. 1956).

358. *Id.* at 955.

359. *Stryker v. Republic Pictures Corp.*, 238 P.2d 670, 671-73 (Cal. Dist. Ct. App. 1951).

enlisted in the Marine Corps.<sup>360</sup> "We think that men who are called to the colors subject their activities in that particular field to the public gaze and may not contend that in the discharge of such activities their actions may not be publicized."<sup>361</sup> The court did not distinguish the difference between agreeing to be viewed by a limited audience and being exposed to millions on the big screen.

Courts also did not account for the medium of exposure in calculating the newsworthiness of the publication and its offensiveness to its subject.<sup>362</sup> When film was popularized, there had been much debate as to whether courts would take into account the cinema's realism and its intense impact on audiences when gauging the harms that might be caused by film depictions of one's image or private life. Courts typically applied print media standards to film, and also to radio.<sup>363</sup> Television, which reached into millions of homes, potentially amplified the harms of unwanted publicity, yet courts continued to use standards developed in the print context.<sup>364</sup> "[S]ince television is the latest medium for the dissemination of news, there [was] every reason for and no reason against applying to television news broadcasts the same rule" that applied to newspapers and magazines.<sup>365</sup>

### 3. *Newsworthiness*

Courts often strained to identify some voluntary action that could be construed as a waiver of privacy or consent to exposure. This was technically unnecessary because consent to public exposure was generally implied by "participation in society" and extended to all newsworthy material. As in the past, a substantial number of privacy cases involving the media implicated involuntary public figures: crime victims, relatives of criminals, the lovers and family members of actors or other public figures. In a 1962 case in which a man unsuccessfully

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360. *Id.* at 672.

361. *Id.*

362. *E.g., id.* at 673 ("The medium of the publication . . . is not a controlling factor.").

363. *See generally* *Smith v. Doss*, 37 So. 2d 118 (Ala. 1948); *Binns v. Vitagraph Co. of Am.*, 103 N.E. 1108 (N.Y. 1913); *Humiston v. Universal Film Mfg. Co.*, 178 N.Y.S. 752, 757-59 (App. Div. 1919).

364. *See* STEIGLEMAN, *supra* note 226, at 229. *See generally* Walter D. Oppenheimer, Jr., *Television and the Right of Privacy*, 1 J. BROAD. 194 (1956); J. Joseph Cummings, Comment, *Television and the Right of Privacy*, 36 MARQ. L. REV. 157 (1952).

365. *Jacova v. S. Radio & Television Co.*, 83 So. 2d 34, 36-37 (Fla. 1955); *see also* *Ettore v. Philco Television Broad. Corp.*, 126 F. Supp. 143, 149 (E.D. Pa. 1954). In *Chavez v. Hollywood Post No. 43*, which involved a televised depiction of a boxing match, a California court concluded that "[a] prize fighter who participates in a public boxing match waives his right of privacy [as] to that fight." *See* Emilie N. Wanderer, *The Right of Privacy*, 56 COM. L.J. 219, 223 (1951) (quoting 15 A.L.R.2d 794 (1951)).

sued a gossip magazine for publishing a story about his first marriage to his high school sweetheart, who would go on to become actress Janet Leigh, the court noted that “people closely related to such public figures in their activities must also to some extent lose their right to the privacy that one unconnected with the famous or notorious would have.”<sup>366</sup> A father who was publicized in a magazine called *Official Detective Combined with Actual Detective Stories* in relation to his son’s death by drug overdose also lost his suit for invasion of privacy.<sup>367</sup> The court concluded that the father had, by virtue of his relationship to his son, “been catapulted into an area of legitimate public news interest.”<sup>368</sup> In *Bradley v. Cowles Magazine*, which involved gruesome photographs in *Look* magazine of a child lynching victim, Emmett Till, the court dismissed Till’s mother’s complaint of invasion of privacy, noting that “chance or destiny may propel a private citizen into the public gaze.”<sup>369</sup> The families of criminals, “the householder who is burglarized, or the victim of an accident”—all may “be equally unwilling to be publicized,” but all surrendered their right to privacy to the extent necessary to report the news.<sup>370</sup>

The content of the popular press continued to be characterized as the expression of the public’s concerns and interests. In a case finding an article about a celebrity scandal in the notorious Hollywood tabloid *Confidential* to be newsworthy, a New York appellate court observed that “[e]ven a cursory examination of the contents of some of our daily newspapers makes evident that such stories are part and parcel of the reading habits of the American public.”<sup>371</sup> The large “circulation of magazines such as ‘Confidential’ is mute testimony that the public is interested in the kind of news those magazines purvey.”<sup>372</sup> As the Third Circuit observed:

Some readers are attracted by shocking news. Others are titillated by sex in the news. . . . Much news is in various ways amusing and for that reason of special interest to many people. . . . This may be a disturbing commentary upon our civilization, but it is nonetheless a realistic picture of society which courts shaping new juristic concepts must take into account.<sup>373</sup>

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366. *Carlisle v. Fawcett Publ’ns, Inc.*, 20 Cal. Rptr. 405, 415 (Dist. Ct. App. 1962).

367. *Rozhon v. Triangle Publ’ns, Inc.*, 230 F.2d 359, 360–61 (7th Cir. 1956).

368. *Id.* at 361.

369. 168 N.E.2d 64, 65 (Ill. App. Ct. 1960).

370. *See Carlisle*, 20 Cal. Rptr. at 415.

371. *Goelet v. Confidential, Inc.*, 171 N.Y.S.2d 223, 226 (App. Div. 1958).

372. *Id.* at 226–27. The magazine spawned a slew of competitors, with titles like *Hush-Hush*, *Uncensored*, *Exposed*, and *On the Q.T.* *See Success in the Sewer*, *TIME*, July 11, 1955, at 90, 90.

373. *Jenkins v. Dell Publ’g Co.*, 251 F.2d 447, 451 (3d Cir. 1958).



During the 1950s, pulp, tabloid, and true crime publications with such titles as *Official Detective Stories*, *Current Detective*, *Uncensored Detective*, and *Women in Crime* became a national craze.<sup>374</sup> Even though the articles were, in the words of the Sixth Circuit, often a “tasteless exploitation” of the gruesome details of violent crimes, they were not actionable insofar as they were newsworthy.<sup>375</sup> So long as the material was not substantially fictionalized, the law did not distinguish between “news for information and news for entertainment.”<sup>376</sup> In July 1965, *Front Page Detective* ran a story about a sixty-two-year-old widow who was raped and murdered.<sup>377</sup> It went on to describe the condition of the woman’s body, which was found in an alley.<sup>378</sup> An Illinois appellate court rejected the privacy claim brought by the woman’s nine children, holding the piece to be newsworthy; the magazine’s wide circulation indicated that it attracted the public’s interest.<sup>379</sup>

The 1950s and 1960s saw a public fascination with juvenile delinquency, leading to an outpouring of crime stories involving children, both as criminals and victims, not only in the pulp magazines, but also in mainstream news outlets.<sup>380</sup> In the pre-war era, most newspapers had strict rules against publishing the pictures of child criminals and victims of crime, but after World War II, such images increasingly appeared, even in highly respected news publications.<sup>381</sup> In the 1950s, a newspaper that carried on its front page a large picture of a murdered boy’s mutilated and decomposed body was held not to be liable to the boy’s parents for invasion of privacy.<sup>382</sup> The court concluded that the boy, though unwillingly, became part of a newsworthy event of public interest and had therefore waived his right to privacy.<sup>383</sup> In *Kelley v.*

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374. Gerhard O. W. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 18–19 (1961) (noting new “pulp and slick magazines and comic books” that fabricated crime stories for the purpose of entertainment).

375. *Cordell v. Detective Publ’ns, Inc.* 419 F.2d 989, 989 (6th Cir. 1969).

376. *Jenkins*, 251 F.2d at 451; see also *Gill v. Hearst Publ’g Co.*, 253 P.2d 441, 444 (Cal. 1953) (“[T]he constitutional guarantees of freedom of expression apply with equal force to the publication whether it be a news report or an entertainment feature.”).

377. *Carlson v. Dell Publ’g Co.*, 213 N.E.2d 39, 40 (Ill. App. Ct. 1965).

378. *Id.*

379. *Id.*

380. See Mueller, *supra* note 374, at 18.

381. STEIGLEMAN, *supra* note 226, at 226.

382. *Bremmer v. Journal-Tribune Publ’g Co.*, 76 N.W.2d 762 (Iowa 1956).

383. *Id.* at 768 (“[T]he courts are not concerned with the canons of good taste, and pictures which startle, shock, and even horrify may be freely published . . . if the subject of the picture consents or if the occasion is such that his right of privacy does not protect him from the publication.”); see also *Abernathy v. Thornton*, 83 So. 2d 235, 236–37 (Ala. 1955) (concluding that a slain child whose photo had been taken on his way to the funeral home, with a bullet protruding

*Post Publishing Co.*, a newspaper published a picture of a girl killed in a car accident.<sup>384</sup> The picture was hideous and distorted her features.<sup>385</sup> The court, dismissing the claim, noted that the photo might have been “indelicate or lacking in good taste” and “distressing to the members of the victim’s family,” but was nonetheless newsworthy, as “[m]any things which are distressing or may be lacking in propriety or good taste are not actionable.”<sup>386</sup>

Although the Supreme Court had not yet addressed the constitutional dimensions of the privacy tort, courts continued to describe the capacious newsworthiness privilege as mandated by the First Amendment.<sup>387</sup> The 1950s and 1960s saw the further liberalization of free speech law by the Supreme Court, and the expansion of the domain of constitutionally protected speech to include pornographic but non-obscene speech and defamatory falsehoods.<sup>388</sup> In cases expanding press rights, the Court reiterated the First Amendment’s protection of publishing on a wide array of public issues,<sup>389</sup> although it did not—and has not—articulated a broad public “right to know.” Courts nonetheless described the newsworthiness privilege as protecting the constitutional “right of the public to be informed,” whether the information was material about a politician’s home and family life,<sup>390</sup> an article about a homicide in *Official Detective Stories* magazine,<sup>391</sup> an article about pedestrian safety that included a photo of a child lying on the street after being hit by a car,<sup>392</sup> or a crime story in *Front Page Detec-*

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from his head, “had become such a public character” that “he had thus forfeited his claim to privacy”).

384. 98 N.E.2d 286, 286–87 (Mass. 1951).

385. *Id.* at 287.

386. *Id.* at 287–88; see also *Mahaffey v. Official Detective Stories, Inc.*, 210 F. Supp. 251 (W.D. La. 1962); *Waters v. Fleetwood*, 91 S.E.2d 344 (Ga. 1956) (holding that the publication and sale of close-up photographs of a murdered fourteen-year-old girl’s body as it was recovered from a river was not an actionable invasion of her mother’s privacy because the photographs pertained to a newsworthy matter of public interest).

387. See *Gajda*, *supra* note 6, at 1061 (“[T]he common-law privilege had been largely subsumed into expanding First Amendment protection of the press . . .”).

388. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Roth v. United States*, 354 U.S. 476 (1957); *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

389. See *Garrison v. Louisiana*, 379 U.S. 64, 72–73 (1964); *Sullivan*, 376 U.S. at 270–71.

390. *Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969).

391. *Blount v. T.D. Publ’g Corp.*, 423 P.2d 421 (N.M. 1966); see also *Frith v. Associated Press*, 176 F. Supp. 671, 676 (E.D.S.C. 1959) (“The public had a right to know the facts.”); *Miller v. NBC*, 157 F. Supp. 240, 243 (D. Del. 1957) (“On the contrary, that which the defendant appropriated was part of the public domain.”); *Harms v. Miami Daily News, Inc.*, 127 So. 2d 715, 717 (Fla. Dist. Ct. App. 1961) (“Society has its rights. The right of privacy must be accommodated to freedom of speech and of the press and to the right of the general public to the dissemination of information.”).

392. *Levertov v. Curtis Publ’g Co.*, 192 F.2d 974 (3d Cir. 1951).

tive.<sup>393</sup> As the Third Circuit wrote in 1958, "[T]he interest of the public in the free dissemination of the truth and unimpeded access to news is so broad, so difficult to define and so dangerous to circumscribe that courts have been reluctant to make such factually accurate public disclosures tortious . . . ."<sup>394</sup> The "broad privilege cloaking the truthful publication of all newsworthy matters" was necessary to prevent "the privacy tort's potential encroachment on the freedoms of speech and the press."<sup>395</sup>

#### 4. *The Effects of Exposure*

"Guaranty of the right of privacy is not a guaranty of hermitic seclusion," noted an Illinois appeals court in *Bradley v. Cowles Magazine, Inc.* in 1960:

We live in a society geared in the opposite direction; a society that makes public demands and imposes public duties. Every election thrusts upon the shyest and most retiring citizen demands and obligations. A political campaign brings forth public insistence that he vote. Every television and radio program blares forth exigent calls to do or buy this or that. The census taker asks for the furnishing of private information. The mail brings importunities of every kind. The telephone serves a like purpose. Finally, the revenue collector pries into the very heart of what used to be a person's private affairs—how much he earned, how much he spent, how much he gave away.<sup>396</sup>

Because the public had gotten used to invasions of privacy and because many people actively sought publicity, mass media depictions of one's image or private affairs were neither always unwanted nor injurious.<sup>397</sup> This was a conclusion that was shared by many postwar sociologists and critics. In the 1950s and 1960s, commentators pointed to the rise of reality television—game shows like *Queen for a Day*, in which housewives told their sad, true stories, and the saddest won

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393. *Jenkins v. Dell Publ'g Co.*, 251 F.2d 447 (3d Cir. 1958); see also *Donahue v. Warner Bros. Pictures Distrib. Corp.*, 272 P.2d 177, 183 (Utah 1954) ("Where the right of privacy of the individual is pitted against the general weal, we give some consideration to the precept that the best social policy is that which results in the greatest good to the greatest number . . . .").

394. *Jenkins*, 251 F.2d at 451; see also *Jacova v. S. Radio & Television Co.*, 83 So. 2d 34, 40 (Fla. 1955) ("[S]ince the preservation of our American democracy depends upon the public's receiving information speedily . . . it is vital that no unreasonable restraints be placed upon the working news reporter or the editorial writer.").

395. *Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969).

396. 168 N.E.2d 64, 65 (Ill. App. Ct. 1960).

397. As Harry Kalven, Jr. wrote, "[T]hose who will come forward with privacy claims will very often have shabby, unseemly grievances and an interest in exploitation." Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 338 (1966).

prizes—as evidence of a widespread desire for mass publicity. For much of the populace, wrote sociologist Edward Shils, “a wide diffusion through television or press is welcomed.”<sup>398</sup>

Thus, in the 1954 case of *Samuel v. Curtis Publishing Co.*, the court held that the plaintiff had no right to be offended by the publication of his photograph in a national magazine because he was portrayed in a sympathetic manner.<sup>399</sup> In *Meetze v. Associated Press*, a newspaper article reporting that a twelve-year-old mother had given birth to a healthy, normal son and giving the names of the mother and her twenty-year-old husband was held not to be an invasion of the couple’s right of privacy because the matter of giving birth was itself not embarrassing or humiliating.<sup>400</sup> In *Gill v. Hearst Publishing Co.*, the majority noted that the plaintiffs had no reason to complain about the magazine photo depicting their public embrace because the picture was quite “complimentary and pleasing.”<sup>401</sup>

## B. Privacy in Postwar America

### I. Panicking About Privacy

There was a privacy panic in the 1950s and 1960s, and the anxiety may well have surpassed the intensity of the panic of the late nineteenth century.<sup>402</sup> As in the 1890s, many of the perceived threats were posed by new technologies. Government projects during World War II and the Cold War, as well as the growth of the private detective trade since the war, had produced new technological innovations that threatened privacy: tiny listening bugs, microphones, miniaturized cameras, closed-circuit television, telephoto lenses, and infrared light technology, among others.<sup>403</sup> The “microminiaturization, simplification . . . , cost reduction, and widespread distribution” of these devices in the 1950s and 1960s facilitated increased state surveillance of private activities.<sup>404</sup> Government monitoring of political protest through wiretapping and other methods of surveillance surged during the McCarthy era, the civil rights movement, and the Vietnam War.<sup>405</sup> Polygraphs and psychological “personality testing” had been present since the early twentieth century but were brought into greatly in-

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398. Shils, *supra* note 42, at 303.

399. 122 F. Supp. 327, 329 (N.D. Cal. 1954).

400. 95 S.E.2d 606 (S.C. 1956).

401. 253 P.2d 441, 445 (Cal. 1953).

402. See DEBORAH NELSON, PURSUING PRIVACY IN COLD WAR AMERICA 9 (2002).

403. See WESTIN, *supra* note 16, at 67.

404. See *id.* at 103, 119.

405. LANE, *supra* note 26, at 133–35 (describing the 1950s as the “wiretapping decade”).

creased use for both corporate and government purposes.<sup>406</sup> Massive data collection became a concern with the rise of the first primitive computers in the 1950s.<sup>407</sup>

Protests and fears around actual and threatened invasions of privacy crested in the early to mid-1960s,<sup>408</sup> with press exposés of government surveillance activities, new computer technologies, and what seemed to be a surfeit of eavesdropping and recording devices marketed for personal use.<sup>409</sup> The Supreme Court's increasing attention to privacy and its recognition in *Griswold v. Connecticut* that various provisions of the Bill of Rights "create zones of privacy"<sup>410</sup> intensified the popular sentiment that privacy was a core aspect of individual liberty that must be zealously protected and defended.<sup>411</sup> A series of popular and scholarly books, with ominous titles like *The Assault on Privacy* and *The Naked Society*, were published in the mid-1960s as attention focused on proposals for a national data center, a government agency that would compile dossiers of private information on every citizen, which ultimately never materialized.<sup>412</sup> As a writer in the *New York Times* lamented in 1966, "What has been described as an age of alienation is, in truth, an age in which no one can ever be sure he is alone."<sup>413</sup>

By the 1960s, the state had largely replaced the press as the focus of the public's privacy anxieties. Tabloids and pulp magazines, though deplored by many, were regarded as an inevitable nuisance, and invasions of privacy by the news media in the form of exposés of government and corporate misdeeds were often celebrated by the public. The postwar era saw acclaimed investigative reporting on government efforts to conceal the truth about the Vietnam War and the repression and persecution of civil rights activists by Southern officials.<sup>414</sup> According to Amy Gajda, these led to a romantic, heroic image of the crusading journalist and increasing "deference to journalists in defin-

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406. WESTIN, *supra* note 16, at 211-78.

407. See LANE, *supra* note 26, at 145.

408. See Symposium, *Privacy*, 31 LAW & CONTEMP. PROBS. 251 (1966).

409. See WESTIN, *supra* note 16, at 179-80, 195-96; see also Robert R. Kirsch, *Individual Privacy Loss: With Us Here, Now*, L.A. TIMES, Mar. 15, 1964, at D18 ("[O]ne by-product of the electronic age is the use of listening, viewing and snooping devices which are becoming ubiquitous, and the employment of computer, memory bank devices which are the most efficient and accessible filing devices ever made.").

410. 381 U.S. 479, 484 (1965)

411. See LANE, *supra* note 26, at 155-56.

412. *Id.* at 144-49; Nan Robertson, *Data Center Held Peril to Privacy*, N.Y. TIMES, July 27, 1966, at 41.

413. Editorial, *Curbing Electronic Snoopers*, N.Y. TIMES, Nov. 28, 1966, at 38.

414. See AUCOIN, *supra* note 344, at 51-52.

ing newsworthiness” in the free speech context.<sup>415</sup> *New York Times Co. v. Sullivan*, which instituted the actual malice standard that must be met before press reports about public officials can be considered libelous, grew out of reporting on the civil rights movement.<sup>416</sup> The *Sullivan* case issued the canonical statement that democracy requires a free press and that the First Amendment dictates “that debate on public issues should be uninhibited, robust, and wide-open.”<sup>417</sup>

In 1967, the actual malice standard was applied to the New York privacy statute in *Time, Inc. v. Hill*.<sup>418</sup> In that case, the Court overturned the decision of the New York Court of Appeals upholding a jury award for *Life* magazine’s invasion of the Hill family’s privacy under the New York privacy statute.<sup>419</sup> Hill and his family had been held hostage in their home by escaped convicts, and the ordeal was made into a play that was highly fictionalized.<sup>420</sup> *Life* magazine disclosed the identity of the Hill family in an illustrated news story about the play and described the play as true.<sup>421</sup> The Supreme Court ruled “that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest” absent proof that the publisher knew of their falsity or acted “in reckless disregard of the truth.”<sup>422</sup>

The majority opinion in *Hill* summarized many of the themes and conclusions of the privacy cases of the previous thirty years. Justice Brennan defined the ambit of constitutional protection as “matters of public interest,” which he appeared to equate with press content—in other words, newsworthy material.<sup>423</sup> “[T]he vast range of published matter which exposes persons to public view, both private citizens and public officials,” was at the heart of the First Amendment’s protections.<sup>424</sup> “Exposure of the self to others in varying degrees is a concomitant of life in a civilized community,” and “the risk of this

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415. Gajda, *supra* note 6, at 1067–68.

416. 376 U.S. 254, 283 (1964).

417. *Id.* at 270.

418. 385 U.S. 374, 387–88 (1967).

419. *Id.* at 387–91.

420. *Id.* at 378.

421. *Id.* at 378–79.

422. *Id.* at 387–88.

423. *Id.* at 388. In Brennan’s opinion, “newsworthiness define[d] the ambit of constitutional concern.” Harry Kalven, Jr., *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 282. “The newsworthy is a kind of speech which is public enough so that its protection cannot be left entirely to state policy.” *Id.* at 281.

424. *Hill*, 385 U.S. at 388.

exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."<sup>425</sup>

## 2. *Privacy Protections Beyond the Law*

Like the *Sullivan* case, journalists and the legal academy celebrated the *Hill* decision, but a few dissenting voices, concerned with what they perceived as declining journalistic standards, wondered whether the press had acquired too much freedom.<sup>426</sup> It is not quite apt to say that journalism "got worse" or that ethics codes were not followed. In many ways, the professionalization of journalism, which reached a high point in this period, led to a greater focus by reporters on social responsibility and ethical canons.<sup>427</sup> At the same time, driven by the trend toward investigative journalism and by market pressures, particularly the competition initiated by television, the news media embarked on more detailed, graphic, and sensationalistic coverage of personal affairs. Critics lamented "the style of television reporting that thrusts a microphone under the chin of a woman who has watched her child [being] injured and urges her to tell the viewers how she feels."<sup>428</sup> One commentator in the 1960s noted NBC's "remorseless focusing" on sustained close-ups of bleeding corpses and notorious incidents in which the family members of murder victims were pursued and assaulted by TV reporters.<sup>429</sup> To compete with television, print journalism delved deeper into the sensational and the personal.<sup>430</sup> In a break with past practice, many papers ran the names, addresses, and other identifying details of crime victims, juvenile delinquents, and attempted suicides.<sup>431</sup> "In the rare cases when names [were] withheld," noted one critic, news stories often included so many details about the victims that it was easy to determine their identities.<sup>432</sup> A writer in the *University of Pennsylvania Law Review*

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425. *Id.*

426. See Marshall S. Shapo, *Media Injuries to Personality: An Essay on Legal Regulation of Public Communication*, 46 TEX. L. REV. 650 (1968); J. Skelly Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630 (1968). The most prominent critic was legal academic Edward Bloustein. See BLOUSTEIN, *supra* note 156.

427. See MAKING JOURNALISTS 101-02 (Hugo de Burgh ed., 2005).

428. WESTIN, *supra* note 16, at 1043.

429. Jack Gould, *TV: Questions of Taste and Restraint*, N.Y. TIMES, Sept. 5, 1963, at 63; see also PACKARD, *supra* note 330, at 217 (noting that "[t]elevision is the most intimate of the media" and that in the early 1960s television reporters and cameramen had come under fire for "pressing too hard for raw drama in covering some news events").

430. See AUCOIN, *supra* note 344, at 75-76.

431. See Ignaz Rothenberg, *Newspaper Sins Against Privacy*, NIEMAN REP., Jan. 1957, at 41.

432. *Id.* at 43; see also JOHN PAUL JONES, *THE MODERN REPORTER'S HANDBOOK* 90-91, 128 (1949) (noting that about seventy-five percent of newspapers in a three-hundred-newspaper

noted that there was an obsession with the “criminal acts of youth”<sup>433</sup> and that without juvenile delinquency, “many [American] newspapers might have to go into receivership.”<sup>434</sup> Media coverage of the Vietnam War introduced a new trend toward graphic photojournalism.<sup>435</sup> The emphasis on “behind the scenes” reporting led to more searching coverage of politicians and their private lives, though their sex lives were still off limits, a taboo that would vanish by the 1970s.<sup>436</sup>

Claiming a mission to root out political corruption, journalists were increasingly using the tactics of the government actors they wanted to expose. Descriptions of press conduct in a 1964 journalism text titled *The Press and Its Problems* noted that reporters were eavesdropping, hiding in closets, and posing “as detectives, coroners’ assistants, or other public or semi-public officials to gain access to places from which they otherwise would be barred.” “They may steal photographs, peek through windows, climb fire escapes to effect entrances into apartments . . . and virtually besiege the dwelling of someone reluctant to be interviewed.”<sup>437</sup> In 1969, during the Democratic National Convention in Chicago, one of NBC’s news directors was indicted by a federal grand jury for bugging hotel rooms in which the party’s Platform Committee was meeting.<sup>438</sup>

Surveillance technology and trends in journalism facilitated and encouraged deeper incursions into the personal and private, and social norms were less likely to restrain them. In the 1960s, sociologists observed an intensified public fascination—“a particular and dangerous form of curiosity”—with “the privacies of personal life, especially sexual conduct among the socially prominent.”<sup>439</sup> There appeared to be greater public acceptance of gruesome images and intimate scenarios in the media, depictions that would have been considered indecent only a few decades earlier. As an editor noted, public tastes had

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sample polled reported “the names of juveniles involved in police charges or juvenile delinquency of any kind” and that although many papers adopted a “standard policy” of not reporting the names of rape victims, they did report names when the victim was a “person of great public prominence” or the crime led to a public trial).

433. See Mueller, *supra* note 374, at 18 (quoting *Governor Signs End of Youth Court Act*, N.Y. WORLD TELEGRAM & SUN, Mar. 29, 1961, at 12).

434. *Id.* (quoting Gerhard O. W. Mueller, *Criminal Law and Administration*, 34 N.Y.U. L. REV. 83, 113 (1959)).

435. See JOHN L. HULTENG, *THE MESSENGER’S MOTIVES: ETHICAL PROBLEMS OF THE NEWS MEDIA* 53–57, 169–72 (1976).

436. See Summers, *supra* note 313, at 838.

437. Willard H. Pedrick, *Publicity and Privacy: Is It Any of Our Business?*, 20 U. TORONTO L.J. 391, 391 (1970) (quoting MACDOUGALL, *supra* note 320, at 338).

438. Joseph W. Bishop Jr., *Privacy vs. Protection—The Bugged Society*, N.Y. TIMES MAG., June 8, 1969, at 117.

439. WESTIN, *supra* note 16, at 55.



“changed considerably since the world war,” leading to “a general relaxing of taboos.”<sup>440</sup> A noted sociologist, writing in 1964 on what he saw as an erosion of privacy norms, observed that “[t]he intimacies of other persons are ‘interesting,’ and where they are degrading to the mighty and great, they are all the more acceptable. The embarrassments of those who have discomfiting disclosures made about them are as attractive as a boxing match.”<sup>441</sup> The television show *Candid Camera*, which broadcast hidden camera footage of ordinary people being confronted with unusual, often embarrassing situations, became wildly popular.<sup>442</sup> “Smile, you’re on candid camera” became the catchphrase of a generation that had become increasingly aware of, and fascinated with, the possibility of constant media surveillance.<sup>443</sup>

This is not to suggest that the public accepted these trends without question or protest. A critic noted in 1959 that “public opinion, in growing degree, angrily reacts to violations of privacy by journalists.”<sup>444</sup> The 1950s and 1960s saw a nationwide campaign against the scandal magazines<sup>445</sup> and the formation of citizen activist groups for improving the media.<sup>446</sup> Audiences continued to register their dissatisfaction with editors and broadcasters, particularly around the practice of publicizing the names and pictures of crime victims,<sup>447</sup> although such pressure may have been less likely to affect editorial decision making than in the past. The continued growth of large-scale media

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440. MACDOUGALL, *supra* note 320, at 119.

441. See Shils, *supra* note 42, at 302.

442. PACKARD, *supra* note 330, at 217.

443. See CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE 41–42 (2000).

444. Ignaz Rothenberg, *Invasion of Privacy in the Codes of Journalists*, NIEMAN REP., Oct. 1959, at 5.

445. Governor Knight of California launched an effort to destroy *Confidential* through criminal libel suits. See Mary Desjardins, *Systematizing Scandal: Confidential Magazine, Stardom, and the State of California*, in HEADLINE HOLLYWOOD: A CENTURY OF FILM SCANDAL 206, 206–31 (Adrienne L. McLean & David A. Cook eds., 2001). Frank Sinatra also brought a highly publicized privacy case against *Look* magazine, which he envisioned as a “test case” for the privacy rights of all celebrities. “Up until now,” he said, “the courts have never really clarified the extent to which a public figure is entitled to a right of privacy. I feel that it is time we had a specific understanding and definition of these rights and I hope this may be the case that establishes it.” *Sinatra Drops His Libel Suit for \$2,300,000*, *supra* note 342.

446. In the 1960s, two major citizen groups—the Action for Children’s Television and the National Citizens’ Committee for Broadcasting—achieved national reputations as organizations for improving the media. See WILLIAM L. RIVERS ET AL., RESPONSIBILITY IN MASS COMMUNICATION 287 (3d ed. 1980).

447. See Rothenberg, *supra* note 444.

conglomerates increasingly distanced publishers from their audiences and tended to diminish accountability.<sup>448</sup>

By the end of the 1960s, many of the safeguards against media depictions of the private that had once been provided by social norms of privacy and editorial practices had diminished without any increase in legal protection. Recognizing this, in a few notable decisions from this period, courts rejected deference to editorial judgment on the newsworthiness issue. In *Patterson v. Tribune Co.*, the court reversed an earlier finding for the newspaper on the grounds that it had acted irresponsibly in printing material about a woman's commitment to a hospital for drug addiction.<sup>449</sup> The material was not in the public record, and the editors had failed to adhere to the public "responsibility which the newspaper fraternity recognizes in its self-governing code."<sup>450</sup> In *Garner v. Triangle Publications, Inc.*, the court dismissed a motion for summary judgment brought by the publisher of several true crime magazines, concluding that it could not say as a matter of law that the articles about the plaintiffs, murder suspects, constituted legitimate news reporting.<sup>451</sup> The sensational nature of the magazine, which ran stories with titles such as *Mystery of the Hanging Corpse*, suggested that it was trying to pass off fiction as news.<sup>452</sup> In *Wagner v. Fawcett Publications*, a highly publicized 1962 case involving magazine

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448. See MICHAEL EMERY & EDWIN EMERY, *THE PRESS AND AMERICA* 532, 536–37 (7th ed. 1992).

449. 146 So. 2d 623, 626–27 (Fla. Dist. Ct. App. 1962).

450. *Id.* at 626. The court commented:

Our metropolitan newspapers . . . are among the technological marvels of the age. They render invaluable public service. They exert tremendous impact on the economy and are vitally important in the gathering and dissemination of news and views. . . . Their editorial pronouncements, subjectively impersonal, make them almost pontifical in their capacity to influence public opinion; and they are rightly blest with the constitutional guaranty of freedom of the press. Such power imposes corresponding responsibility . . . .

*Id.*

451. 97 F. Supp. 546, 548–49 (S.D.N.Y. 1951).

452. *Id.* at 549; see also *Annerino v. Dell Publ'g Co.*, 149 N.E.2d 761, 763 (Ill. App. Ct. 1958) ("There is no difficulty in ascertaining that what plaintiff complains of is not news reporting, but the use of her photograph in connection with a 'story' which makes a strong appeal to the idle and prurient."). In a few reported cases, courts found material to be non-newsworthy when it challenged prevailing views of gender and sexual modesty. When a newspaper ran a photo of a woman whose skirt was blown up around her waist as she stepped over an air vent as she emerged from a funhouse at a public fairground, the Supreme Court of Alabama affirmed an award of several thousand dollars against the newspaper, finding the material not to be newsworthy. *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1964). In *Harms v. Miami Daily News, Inc.*, a Florida appellate court found an article urging readers to call a woman's phone number if they "[w]anna hear a sexy telephone voice" to have no relationship whatsoever to the news. 127 So. 2d 715, 716, 718 (Fla. Dist. Ct. App. 1961)

stories of the gruesome rape and murder of the plaintiff's daughter,<sup>453</sup> the Seventh Circuit held the publication to be actionable because the article had been published two months after the girl's death.<sup>454</sup> The court observed, "When the news media have served their proper function in reporting current events, private individuals involved therein sink back into the solitude which is the right of every person."<sup>455</sup> But such outcomes were not typical and were contrary to the dominant position that "the right of privacy is generally inferior and subordinate to the dissemination of news."<sup>456</sup>

### 3. *Post-1970s Trends*

Since the 1970s, competition in the media industries and a "preoccupation with marketing, promotion, and market share" have led to the "tabloidization" of journalism, the rise of "infotainment," and new genres—reality television and talk shows, among them—that seek to shock and titillate with more explicit displays of the private.<sup>457</sup> The rise of the media-driven political sex scandal in this period largely destroyed the possibility of privacy for public figures, and mainstream publishing abandoned longstanding taboos against the exposure of the sexual.<sup>458</sup> Courts nonetheless continued to defer to the press on the issue of newsworthiness.<sup>459</sup> In the words of the *Restatement (Second) of Torts*, "To a considerable extent, . . . the publishers and broadcasters have themselves defined the term . . . ."<sup>460</sup> Items that have been held to be newsworthy have included the death of a child in an un-

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453. No. 13541 (7th Cir. June 18, 1962), *rev'd on rehearing*, 307 F.2d 409 (7th Cir. 1962).

454. *Id.*

455. *Id.* However, upon rehearing, the court reversed itself on the ground that the events in question were still current because the legal proceedings were still taking place against the accused at the time of the publication. 307 F.2d at 411.

456. *Blount v. T.D. Publ'g Corp.*, 423 P.2d 421, 424 (N.M. 1966).

457. Andrew Calabrese, *Political Space and the Trade in Television News*, in *TABLOID TALES: GLOBAL DEBATES OVER MEDIA STANDARDS* 43, 44 (Colin Sparks & John Tulloch eds., 2000).

458. Thomas Nagel describes the media circus around President Clinton's sexual affairs as the shredding of public privacy. *See* NAGEL, *supra* note 16, at 27.

459. Although, as Amy Gajda has suggested, "some courts have grown distinctly less deferential to journalism in privacy cases" in response to public dissatisfaction with the sensationalism of news reporting. *See* Gajda, *supra* note 6, at 1042. In 2006, for example, a court held that a gossip story in a Washington newspaper about a CNN assignment editor that named several men she had dated was categorically "not a matter of public concern." *Benz v. Wash. Newspaper Publ'g Co.*, No. 05-1760 (EGS), 2006 WL 2844896 (D.D.C. Sept. 29, 2006).

460. *RESTATEMENT (SECOND) OF TORTS* § 652D cmt. g (1977); *see also* *Heath v. Playboy Enters., Inc.*, 732 F. Supp. 1145, 1149 n.9 (S.D. Fla. 1990) ("[W]hat is newsworthy is primarily a function of the publisher, not the courts."); *Rawlins v. Hutchinson Publ'g Co.*, 543 P.2d 988, 996 (Kan. 1975) ("A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974))).

locked refrigerator;<sup>461</sup> the identity of a woman who abandoned a newborn child;<sup>462</sup> the gruesome close-up of a murder victim's skull;<sup>463</sup> the extrication of a woman from a crashed car;<sup>464</sup> a sex-change operation;<sup>465</sup> and a photograph of a participant in a high school soccer game that displayed his exposed genitalia, among others.<sup>466</sup> Although the Supreme Court has not yet ruled on the constitutional dimensions of tort liability for invasions of privacy by public exposure,<sup>467</sup> the broad newsworthiness standard continues to be framed in terms of freedom of the press, the public's right to access the news, and the public interest.<sup>468</sup>

Many of the most controversial cases in recent decades involving the public exposure of private material in the media have involved names, addresses, and identifying details about intimate or private affairs, often involving tragic circumstances.<sup>469</sup> Such details have often been held newsworthy because they add "color" or credibility to reporting.<sup>470</sup> As Judge Richard Posner observed in a case upholding, on

461. *Costlow v. Cusimano*, 311 N.Y.S.2d 92 (App. Div. 1970).

462. *Pasadena Star-News v. Superior Court of L.A. Cnty.*, 249 Cal. Rptr. 729 (Ct. App. 1988).

463. *Abernathy v. Thornton*, 83 So. 2d 235 (Ala. 1955).

464. *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998).

465. *Schuler v. McGraw-Hill Co.*, No. 97-2225, 1998 WL 193132 (10th Cir. Apr. 22, 1998).

466. *McNamara v. Freedom Newspapers, Inc.*, 802 S.W.2d 901 (Tex. Ct. App. 1991). *But see* *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762 (Ct. App. 1983) (holding that the publication of the fact that the plaintiff, a transsexual, underwent gender corrective surgery and became a woman was not newsworthy); *Green v. Chi. Tribune Co.*, 675 N.E.2d 249 (Ill. App. Ct. 1996) (mother's grief-stricken statements upon seeing her son's dead body); *Pohle v. Cheatham*, 724 N.E.2d 655 (Ind. Ct. App. 2000) (sexually explicit photo); *Gallon v. Hustler Magazine, Inc.*, 732 F. Supp. 322 (N.D.N.Y. 1990) (sexually explicit photo); *Hawkins v. Multimedia, Inc.*, 344 S.E.2d 145, 146 (S.C. 1986) ("Public or general interest does not mean mere curiosity, and newsworthiness is not necessarily the test.").

467. The Court has ruled, however, that in cases involving mass media disclosure of private facts obtained from public records, the First Amendment forbids liability for the publication of truthful information except when doing so would contravene "a state interest of the highest order." The Court has yet to define the protection of personal privacy as an "interest of the highest order." *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979); *see also* *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001); *Fla. Star v. B. J. F.*, 491 U.S. 524, 524-25 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 475 (1975).

468. As one judge observed, regardless of whether the press caters to the public's preexisting tastes or "creates the demand for shocking, scandalous, pathetic, or titillating 'human interest' news by providing a supply," the fact remains that people consume the media, and therefore, publishers must be addressing the public's interests. *See* *Anderson v. Fisher Broad. Co.*, 712 P.2d 803, 809 n.9 (Or. 1986).

469. According to one study, 63.4% of newspaper stories and 42.2% of television stories name crime victims. STEVEN M. CHERMAK, *VICTIMS IN THE NEWS* 127 tbl.5.4 (1995).

470. *But see* *Capra v. Thoroughbred Racing Ass'n of N. Am., Inc.*, 787 F.2d 463 (9th Cir. 1986) (concluding that a reasonable jury could find the identification of plaintiffs to be either highly offensive or not newsworthy); *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488 (Mo. Ct. App. 1990) (concluding that a reasonable jury could find the identification of plaintiffs as users of in vitro fertilization offensive and therefore not newsworthy).

First Amendment grounds, the reporting of private facts about an ordinary citizen (“his heavy drinking, his unstable unemployment, his adultery, his irresponsible and neglectful behavior toward his wife and children”), “[r]eporting the true facts about real people is necessary to ‘obviate any impression that the [general social] problems raised in the [reporting] are remote or hypothetical.’”<sup>471</sup> In *Ross v. Midwest Communications, Inc.*, where a rape victim sued a television station for broadcasting a documentary about rape that used her actual first name and a picture of her residence,<sup>472</sup> the Fifth Circuit affirmed summary judgment for the journalists, holding that the details reported were newsworthy as a matter of law: “Communicating that this particular victim was a real person with roots in the community . . . [was] of unique importance to the credibility and persuasive force of the story.”<sup>473</sup>

The celebrity’s presumed waiver of privacy remains expansive. In a representative case, when an actress sued a website for publishing her home address, the court held that the disclosure was not actionable because the address was not private, given the “tours and maps offered of ‘Star’s Homes’ throughout Los Angeles County,” and that by becoming an entertainment celebrity, the actress took on the risk that her domestic life would be exposed to the public.<sup>474</sup> Ordinary people, no less than celebrities, are still held to assume the risk of media publicity by conducting “newsworthy” activities in public view.<sup>475</sup> For ex-

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471. See *Haynes v. Knopf, Inc.*, 8 F.3d 1222, 1230, 1233 (7th Cir. 1993) (quoting *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir. 1981)).

472. 870 F.2d 271, 272 (5th Cir. 1989).

473. *Id.* at 274. But see *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 755 (N.D. Cal. 1993) (concluding that, although domestic violence in general was of legitimate public concern, “[p]laintiffs’ personal involvement in an incident of domestic violence [was not] newsworthy as a matter of law”); *Doe v. Univision Television Grp., Inc.*, 717 So. 2d 63, 65 (Fla. Dist. Ct. App. 1998) (although the subject of poorly performed plastic surgery in foreign countries was a matter of public interest, plaintiff’s identity was not).

474. *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, 1069 (C.D. Cal. 2002). However, a federal district court in California found that a videotape of celebrity couple Pamela Anderson Lee and Bret Michaels having sex not to be newsworthy and that they did not waive their right to privacy over their sex lives even though they had appeared in sexually charged contexts as public performers. The court was “not prepared to conclude that public exposure of one sexual encounter forever removes a person’s privacy interest in all subsequent and previous sexual encounters.” *Michaels v. Internet Entm’t Grp., Inc.*, 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998). A California appellate court concluded that a newspaper report on the personal affairs of actor Eddie Murphy’s son and former girlfriend were not newsworthy because they “were private citizens who never sought to publicize their relationship to Mr. Murphy.” *Hood v. Nat’l Enquirer, Inc.*, No. B082611 (Cal. Ct. App. 1995) (unpublished opinion).

475. See, e.g., *Sandler v. Calcagni*, 565 F. Supp. 2d 184, 198 (D. Me. 2008) (holding that cosmetic nasal surgery is “by its nature exposed to the public eye” and not “truly private”); *Cheatham v. Paisano Publ’ns, Inc.*, 891 F. Supp. 381 (W.D. Ky. 1995) (a photo of plaintiff’s fishnet covered posterior at a biker’s convention was not private); *Neff v. Time, Inc.*, 406 F.

ample, in 2002, a film producer and distributor followed a woman into a nightclub bathroom and filmed her kissing a man in a stall, then played that film on a television program and used the photo of a scene to advertise the program nationwide on the Internet. The district court concluded that the woman's kissing the man was not a private act because the woman had earlier kissed the same man on a city sidewalk in plain view.<sup>476</sup> Private facts can become public even if they are disclosed to only a few persons.<sup>477</sup> In *Duran v. Detroit News, Inc.*, a Colombian judge who had been threatened by drug lords fled her native country.<sup>478</sup> She used her name when shopping and eating at restaurants and told a few neighbors who she was.<sup>479</sup> Local reporters disclosed her address and her history.<sup>480</sup> The court held that by conducting activities in stores and other public places, she had made her identity public.<sup>481</sup>

Courts remain suspicious of the harms alleged by media displays of private life, reasoning that, as the Supreme Court of Indiana observed in 1997, "[i]n our . . . age of talk shows, tabloids, and twelve-step programs, public disclosures of private facts are far less likely to cause shock, offense, or emotional distress than at the time Warren and Brandeis wrote their famous article."<sup>482</sup> Earlier gendered assump-

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Supp. 858 (W.D. Pa. 1976) (plaintiff portrayed with zipper open at a football game); *Livingston v. Ky. Post*, 14 Media L. Rptr., 2076 (Ky. Cir. Ct. 1987) (photo of plaintiff exiting from Port-O-Let). *But see* *Taylor v. K.T.V.B., Inc.*, 525 P.2d 984 (Idaho 1974) (holding that the portrayal of plaintiff's arrest in the nude on his front porch in open view was actionable if malicious).

476. *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118 (N.D. Cal. 2002).

477. For a discussion of this binary model of privacy, see Madell, *supra* note 6, at 923–24. *But see* *Lowe v. Hearst Commc'ns, Inc.*, 487 F.3d 246 (5th Cir. 2007); *M.G. v. Time Warner, Inc.*, 107 Cal. Rptr. 2d 504 (Ct. App. 2001) ("[T]he claim of a right of privacy is not so much one of total secrecy as it is of the right to define one's circle of intimacy . . . . Information disclosed to a few people may remain private." (internal quotation marks omitted)); *Multimedia WMAZ, Inc. v. Kubach*, 443 S.E.2d 491, 494 (Ga. Ct. App. 1994) (concluding that when the plaintiff told "a relatively small number of people" about his AIDS status, it was not a public fact). In *Y.G. v. Jewish Hospital of St. Louis*, a couple that was participating in a hospital's in vitro fertilization program attended a social function commemorating the program's anniversary. 795 S.W.2d 488, 492 (Mo. Ct. App. 1990). They sued the hospital and a television station for invasion of privacy after the station filmed them at the function without permission. *Id.* at 492. The trial court granted the defendants' motions to dismiss. *Id.* at 493. Reversing and remanding, the appeals court held that the plaintiffs had not waived their right to privacy by merely attending the function, where they chose to disclose their participation only to other participating couples. *Id.* at 502–03.

478. 504 N.W.2d 715, 718 (Mich. Ct. App. 1993).

479. *Id.*

480. *Id.*

481. *Duran v. Detroit News, Inc.*, 504 N.W.2d 715 (Mich. Ct. App. 1993).

482. *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 692 (Ind. 1997). The dominant position is still that the offensiveness criterion is met only when the disclosures are extremely intrusive and uncomplimentary. *See, e.g., Gruneth v. Marriott Corp.*, 872 F. Supp. 1069, 1075 (D.D.C. 1995); *Key v. Compass Bank, Inc.*, 826 So. 2d 159, 165 (Ala. Civ. App. 2001). As Jeffrey Rosen writes,

tions about sensitivity to exposure are less closely held. In *Cape Publications, Inc. v. Bridges*, the female plaintiff was said to suffer no exposure of intimate details when she was photographed, clad only in a dish towel, while escaping from her estranged husband.<sup>483</sup> The court held that embarrassing and awkward as the situation might be, the only intimate details revealed would also be revealed by an ordinary bikini.<sup>484</sup> From 1974 to 1984, plaintiffs prevailed in less than seven percent of cases against the media involving the publication of private material.<sup>485</sup> Critics began to pronounce the tort officially “dead.”<sup>486</sup>

## V. CONCLUSION: PRIVACY PAST AND FUTURE

In sum, the doctrinal foundations of modern tort privacy law were forged largely between the 1920s and the 1950s, a period that saw the rise of celebrity culture, the emergence of modern constitutional free speech jurisprudence, and a “culture of exposure” in which earlier prohibitions on public expressions of the private were being shed in favor of greater openness and self-disclosure.<sup>487</sup> Within this context, as we have seen, despite the weakness of privacy law, social norms, public pressure on journalists, and self-imposed professional standards protected privacy in ways that would diminish over time.<sup>488</sup> By the end of the twentieth century, titillating behind-the-scenes reporting, “twenty-four-hour news . . . , and celebrity gossip and rumor-heavy websites” had become central features of the media landscape.<sup>489</sup> Today, material that would have once alarmed audiences now merely amuses.<sup>490</sup> News websites and blogs often operate without the editorial controls of professional journalism, and the technological capacities of the web permit the details of our private lives to be

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“In order to be actionable today, the disclosure of embarrassing facts has to be so outrageous that it verges on voyeurism or obscenity, leaving no doubt that the exposure would shame and humiliate a person of ordinary sensibilities in any community.” ROSEN, *supra* note 16, at 52.

483. 423 So. 2d 426, 427–28 (Fla. Dist. Ct. App. 1982).

484. *Id.* But see *McCabe v. Village Voice, Inc.*, 530 F. Supp. 525 (E.D. Pa. 1982) (holding that a published photograph of the plaintiff nude in a bathtub, together with a caption naming the plaintiff, was not newsworthy because it “serve[d] no legitimate purpose of disseminating news” and needlessly exposed aspects of the plaintiff’s private life to the public (internal quotation marks omitted)).

485. Plaintiffs prevailed in twelve percent of cases involving nonmedia defendants over the same period. RANDALL P. BEZANSON ET AL., *LIBEL LAW AND THE PRESS* 116 tbl.6-6 (1987).

486. Mintz, *supra* note 4, at 426 (“[O]ne third of the Supreme Court and most of privacy academia have pronounced dead the more than century-old tort of public disclosure of private facts.”); see also Bezanson, *supra* note 7, at 1174 (asking that the tort be “formally interred”).

487. See generally GURSTEIN, *supra* note 43.

488. See generally CALVERT, *supra* note 443. See also McClurg, *supra* note 6, at 1087.

489. Gajda, *supra* note 6, at 1042.

490. See Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723 (1999).

documented and displayed to the world in an instant.<sup>491</sup> Legal rules are premised on assumptions about technologies and social conditions; as conditions change, rules must be revisited.<sup>492</sup> The threats to privacy posed by new technologies, and the erosion of the norms and practices that once provided a shield, however partial, from the public gaze, urge a reexamination of many of privacy law's foundational premises.

The most obvious matter for reconsideration is the newsworthiness standard. This Article has argued that the principle that courts should generally defer to the media's judgment as to what is a newsworthy matter of public concern emerged from a particular set of historical circumstances. The broad definition of "news" and "matters of public concern" reflected the cultural populism and civil libertarianism that began to shape popular political thought in the 1930s and 1940s; it originated in a period when there were in fact substantial legal restrictions on publishing and reporting and when morals regulations threatened to exert a chilling effect on the dissemination of news and popular entertainment. Most of these content and viewpoint-based restrictions have since been abolished, however, due in part to developments in constitutional free speech law.<sup>493</sup> The problem we may now face is not so much an inhibited press or a dearth of news, but—particularly given the explosion of information online—too much information.

While the "right to know" and the "free flow of information" have been modern ideals, there are also, as Daniel Solove aptly puts it, virtues to knowing less.<sup>494</sup> While private facts may help us assess people's character and trustworthiness,<sup>495</sup> and vivid details may make reporting seem more credible,<sup>496</sup> such information can also seriously

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491. See generally Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185 (2006). See also Madell, *supra* note 6, at 920 (noting the need for a more precise newsworthiness standard because "people have lost the protection of an institutional news media and because the very essence of a community-norms approach is obliterated by the global context of the Internet"); Rodney A. Smolla, *Will Tabloid Journalism Ruin the First Amendment for the Rest of Us?*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 1, 9–10 (1998).

492. Gewirtz, *supra* note 18, at 170.

493. See *id.* at 171 ("[T]he press today is not seriously endangered by government restrictions, and individual speakers are not seriously threatened by government-imposed conformity of viewpoint. Debate about public issues and public figures is extremely vigorous. The boundaries of the permissible have been extended very far out.").

494. See Solove, *supra* note 6.

495. See Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 394–95 (1978).

496. Randall Bezanson argues that detailed reporting on private life may have "significant [F]irst [A]mendment value when viewed in the context of journalistic methods." The "medium must . . . appeal to highly diverse frames of reference, and in reaching its audience, the news



mislead and distract.<sup>497</sup> Many news stories could be reported just as effectively, if not more so, without identifying information.<sup>498</sup> The media's focus on the private lives of public officials can distort their achievements and steer public attention away from political issues of real importance.<sup>499</sup> In an observation that has grown increasingly meaningful over the years, Warren and Brandeis wrote about gossip trivializing public discourse and "usurp[ing] the place of interest in brains capable of other things."<sup>500</sup> The argument, first suggested in the interwar period, that we may need mass-circulated gossip and intimate personal stories to forge social connections and common bonds among a diverse public may still be true to some extent. Yet that idea originated at a time when there was much less information about private lives circulating in the public sphere.

There is also good reason to question the assumption that the press represents the public's interest. The class-based nature of the conflict over popular media in the early to mid-twentieth century encouraged a characterization of the press as the representative of the mass public, rather than social elites. Of course, the press has never been the true proxy of the "public interest"—if ever such an interest could be defined. While media content tracks public values and trends, it also creates those priorities and interests.<sup>501</sup> Nonetheless, if publishers were ever closely in tune with the public's tastes and concerns, those days have arguably passed. The practice of local journalism has de-

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publisher must use means directed toward reducing or eliminating the variety of initial barriers to understanding or perceiving a given subject matter." Means of accomplishing this include "personalization" or "other intimate personal details to which people can relate in a fairly direct way." Bezanson, *supra* note 156, at 1071.

497. See ROSEN, *supra* note 16, at 156.

498. Solove, *supra* note 6, at 1021 (noting that, "historically, stories of paramount importance have not identified the critical parties"; for example, the reporting on Watergate relied on a pseudonymous source). But see Zimmerman, *supra* note 4, at 356 ("A factual report that fails to name its sources or the persons it describes is properly subject to serious credibility problems."). Whether a story is news, as Marc Franklin pointed out many years ago, is a question separable from whether the identities of the people involved are part of that news. See Marc A. Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107, 116 (1963).

499. As Paul Gewirtz has noted, "[I]nformation about the private lives of public officials so readily distracts us from their official actions that limiting press coverage of these private matters would likely enhance the public discourse and public debate that is at the heart of the First Amendment's purposes." Gewirtz, *supra* note 18, at 183; see also Geoffrey R. Stone, *Images of a Free Press*, 90 MICH. L. REV. 1246, 1263 (1992) (book review).

500. Warren & Brandeis, *supra* note 2, at 196.

501. The media perform an "agenda-setting function": they tell us not only what to think about particular issues, but what issues to focus on in the first place. Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of the Mass Media*, 36 PUB. OPINION Q. 176, 177 (1972).

clined, and editors and publishers often operate at great distance from their readers, both culturally and geographically.<sup>502</sup> Many journalists believe that the press may also be less in touch with the needs and interests of the public than it once was because of increasing concerns with the bottom line.<sup>503</sup> Gallup polls show a decline in the public's confidence in the media.<sup>504</sup> The First Amendment Center's 2009 State of the First Amendment survey reported that thirty-nine percent of the adults surveyed believe that the press in America "has too much freedom to do what it wants."<sup>505</sup> Sixty-nine percent of those surveyed by a 2011 Pew Center poll believed that "news organizations invade people's privacy."<sup>506</sup>

A familiar counterargument contends that media exposures of the private must be serving the public's interest or else audiences would not bother with them: the economic survival of publishers and broadcasters depends upon their ability to provide a product that the public will consume.<sup>507</sup> Yet the domain of socially valuable—and constitutionally protected—speech is not defined by what the public will buy. Defamation law draws a distinction between "matters of public interest"—information that is relevant to democratic self-governance—and material that "the public is interested in"—matters that people are curious about.<sup>508</sup> The Supreme Court has declared "matters of public concern" to be at the heart of the First Amendment's protection,<sup>509</sup> and their discussion promotes the values protected by the con-

502. See FCC, *THE INFORMATION NEEDS OF COMMUNITIES* (2011) (noting that newspapers and television stations have half the staff that they did in the 1980s and one consequence of this is the demise of local reporting).

503. See Anita L. Allen, *Why Journalists Can't Protect Privacy*, in *JOURNALISM AND THE DEBATE OVER PRIVACY*, *supra* note 168, at 69; Richard L. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781, 816 (2009).

504. See Gajda, *supra* note 6, at 1068.

505. FIRST AMENDMENT CTR., *STATE OF THE FIRST AMENDMENT* 2009.

506. PEW RESEARCH CTR., *VIEWS OF THE NEWS MEDIA: 1985–2011*, at 9 (2011), available at <http://www.people-press.org/files/legacy-pdf/9-22-2011%20Media%20Attitudes%20Release.pdf> (noting that a significant majority of the American public thinks that news stories are inaccurate and that the news is biased; the proportion of the public saying that the press is "immoral" is at an all-time high).

507. "The press, after all, has a better mechanism for testing newsworthiness than do the courts." Zimmerman, *supra* note 4, at 353. Prosser remarked, "To a very great extent the press, with its experience or instinct as to what its readers will want, has succeeded in making its own definition of news. A glance at any morning newspaper will sufficiently indicate the content of the term." Prosser, *supra* note 8, at 412.

508. Smolla, *supra* note 7, at 302; see also Edelman, *supra* note 17, at 1230.

509. See *Connick v. Myers*, 461 U.S. 138 (1983). The Court has recognized the social value of public exposure to a wide array of topics. Matters of public concern encompasses "expression about philosophical, social, artistic, economic, literary, or ethical matters," commercial speech, and sexual matter—"far more than politics in a narrow sense." *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 41 (1971); see also Va.

stitutional guarantees of free speech. Matters of general newsworthiness, however, do not necessarily promote the same values.<sup>510</sup> The replacement of newsworthiness with a more substantive matters of public concern standard would align the privacy tort not only with the aims of freedom of speech, but also public opinion, at a time of rising public dissatisfaction with the trivialization of the news.<sup>511</sup>

Another assumption that should be revisited is the notion, dating from the early years of photojournalism, that one waives his or her right to privacy by appearing in public and that privacy cannot be violated in a public place.<sup>512</sup> As many have noted, this binary, locational model of privacy does not map onto the way that privacy is generally understood and experienced in real life.<sup>513</sup> We are all aware of circumstances in which privacy can be violated even though the subject is in public—when an intimate or private scene such as a funeral is put on display, for example, or when the body is exposed in a state of illness or vulnerability. A more useful model would define privacy, as does philosopher Helen Nissenbaum, contextually and situationally—invasions of privacy occur when information flows out of context, in ways that are inappropriate under the norms and expectations of any given situation.<sup>514</sup> Another approach is conceiving privacy in terms of “zones of intimacy.” These zones, to quote Thomas Emerson, would encompass “those activities, ideas, or emotions which one does not share with others or shares only with those who are closest,” including matters such as sexual relations, bodily functions, and family rela-

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State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976); Roth v. United States, 354 U.S. 476, 487 (1957).

510. As Edward Bloustein observed:

Whatever is published may indeed be newsworthy, in the sense of satisfying the public interest or curiosity. It is also certainly the case that the press should be the final arbiter of newsworthiness, of what is worth reporting . . . But neither of these statements is the same as saying that the press is the final arbiter of newsworthiness in the sense of determining what the public must be informed of for the purposes of fulfilling its self-governing functions.

BLOUSTEIN, *supra* note 156, at 83.

511. See Blackman, *supra* note 6, at 379–80; Solove, *supra* note 6, at 987–88. California’s newsworthiness test requires consideration of the social worth of the public disclosure. Its “three part test for newsworthiness” is comprised of (1) the social value of the facts published; (2) the depth of intrusion into ostensibly private affairs; and (3) the extent to which an individual voluntarily acceded to a position of notoriety. See Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 483–84 (Cal. 1998).

512. “Tort law clings stubbornly to the principle that privacy cannot be invaded in or from a public space.” McClurg, *supra* note 6, at 990.

513. Richards & Solove, *supra* note 4, at 1889.

514. See NISSENBAUM, *supra* note 6, at 96–98.

tions.<sup>515</sup> These contextual approaches recognize that privacy may have only a tangential relationship to physical space and that our lives are lived neither strictly in private nor in public, but rather in grey, fluid, intermediate domains.

The desensitization argument dates back to the mid-twentieth century: because exposing one's feelings and aspects of one's private life had become a normal part of constructing a public identity, because celebrity was glamorous, because the private home had been "invaded" by mass communications, and because the collection of personal information by the state had become routine, most people did not mind putting their private affairs on display and perhaps even sought to be publicized. While it may have been true at the time that there was less sensitivity and embarrassment around revealing aspects of private life than in the past, this argument failed to acknowledge the important difference between sharing one's intimacies with a limited public and having one's private affairs broadcast to a mass audience of strangers.<sup>516</sup>

Context matters and the medium matters. Warren and Brandeis were particularly attuned to the threats to privacy posed by candid photography. As Andrew McClurg observes, film and video's "capacity to capture not just a single image of a person, but much of her personality," magnified those harms.<sup>517</sup> As Danielle Citron notes, while the injuries inflicted by twentieth-century media were often temporary—films appeared in theaters for a limited time and newspapers remained in circulation for only a few days—"[t]he searchable, permanent nature of the internet extends the life and audience of privacy disclosures, and exacerbates individuals' emotional and reputational injuries."<sup>518</sup> Although most of us are comfortable divulging secrets to friends and even disclosing personal data to the government, to companies, and to researchers—and revealing much, perhaps too much, online—this does not translate into a willingness to be exposed to any audience in any medium.

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515. Thomas I. Emerson, *The Right of Privacy and Freedom of Press*, 14 HARV. C.R.-C.L. L. REV. 329, 343 (1979); see also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 487 (1975) ("[P]owerful arguments . . . have been made, that . . . there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press . . ."); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("Various guarantees [of the Constitution] create zones of privacy.").

516. See Gavison, *supra* note 16, at 469 ("[S]ignificant media exposure is humiliating, one-dimensional, and offensive even if it is accurate and sympathetic.").

517. McClurg, *supra* note 6, at 1043.

518. Citron, *supra* note 5, at 1808.

Again, it is useful to remember origins: many of the features of modern privacy law date back to the early years of the “culture of exposure,” when fame, celebrity, and publicizing the personality were viewed with a certain amount of optimism and possibility. This outlook, and the era’s fears of press censorship, may explain why the courts of that time were inclined to minimize the harms of unwanted public exposure of one’s image and private life. Today, in an entirely different cultural and communicative environment, when the stakes of privacy invasions are much greater, we should not fall into the trap of believing that because we expose ourselves in some contexts it is a desirable prospect under every circumstance.

The present privacy panic offers possibilities for creative thinking and significant legal growth and development. In this moment of heightened sensitivity to privacy concerns, it is both appropriate and necessary to question the premises and assumptions of privacy law. This Article has illustrated some of those assumptions and their historical origins. In doing so it has attempted to make at least two points clear. One is that the law has been generally inattentive to privacy’s lived, situational aspects. It has also been insensitive to privacy’s broader sociohistorical contexts. Our privacy needs and our understandings of privacy at any given time reflect societal norms, the state of technology, and the cultural and informational environment—rapidly evolving, highly volatile forces. The law has lacked similar dynamism.

We should recognize privacy’s historical and cultural contingencies, the doctrine’s flawed premises, and the need for greater nuance and precision in the law. Like all values worth protecting, privacy cannot be defined in rigid, binary terms, reduced to simple formulae, or frozen in time. The protection of privacy should be envisioned in holistic terms; the law is part of a system for the protection of privacy that implicates technology, social norms, and media practices, and it may have a heightened role to play when other protections fail. While the exigencies of the present moment demand innovation in the law, there is also much to be had from the insights of the generation that first identified the need for a right to be “let alone.” Their primary contribution to the present discussion may not be so much in rules and technicalities, but in “taking the harmfulness of invasion of privacy seriously.”<sup>519</sup>

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519. Gavison, *supra* note 16, at 467.